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ERISA: THE ARBITRARY AND CAPRICIOUS RULE UNDER SIEGE

*George Lee Flint, Jr. **

The recent increase in litigation over the proper rule for judicial review of discretionary plan administrator decisions made for employee benefit plans indicates that few employers have realized the importance of the problem. Whether a court reviews an administrator's decision under the arbitrary and capricious rule or engages in *de novo* review is the heart of the success or failure of the Employee Retirement Income Security Act of 1974 (ERISA).¹ The method of review chosen by the courts will determine the fairness by which a plan administrator administers an employee benefit plan. Unless the courts adopt the analysis set forth in this Article, ERISA, as interpreted by the courts, will become an employer-favoring statute rather than the statute Congress designed to protect the interests of employees.

After explaining the problem currently facing plan administrators and employees, this Article investigates the meaning of the arbitrary and capricious rule in various circuits. Then, it examines the current dissatisfaction with the arbitrary and capricious rule. This Article reviews the origin of, and hence the policy behind, the arbitrary and capricious rule. Moreover, it traces the court's review of discretionary decisions for employee benefit plans under state common law and the Labor Management Relations (Taft-Hartley) Act of 1947 (LMRA).² This Article shows ERISA's break with the common law and the LMRA, the obvious intent of Congress to follow the trust rules modified appropriately for employee benefit plans, and the failure of the courts to recognize clearly the problem and to carry out Congress' intent. This Article asserts that the appropriate analysis permits the application of the arbitrary and capricious standard to review only the decisions of disinterested plan administrators with proper motives and requires *de novo* review in all other situations, namely the case of the interested plan adminis-

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1. 29 U.S.C. §§ 1001-1461 (1982 & Supp. 1987).

2. 29 U.S.C. §§ 141-187 (1982 & Supp. 1987).

trator with proper motives and the case of demonstrated self-dealing or other improper motives of the plan administrator. This essential approach is designed only to protect the employee/beneficiary from the unscrupulous employer who maintains excessive control over the plan administrator.

I. THE HYPOTHETICAL AND THE DILEMMA

Suppose the president of a local corporation calls his lawyer and relates that his most promising employee quit to establish a competing business or join a competing firm.³ This employee requested his considerable benefit immediately in a lump sum from an established corporate plan. Suppose further that the president desires to prevent a portion of the retirement fund from use in a competing business or to punish the former employee by withholding the money. The president asks how to prevent the payment. The typical response requires the plan administrator, a corporate employee, to resolve that, because plan benefits shall supplement retirement income after the retirement age, the plan shall retain all benefits until the respective employee reaches retirement age. The retirement plan generally would authorize such action by a plan administrator because most plans provide the administrator with discretion concerning payment of benefits⁴ and plan interpretation.⁵ A plan administrator would usually provide an exception for

3. This situation tracks the facts of *Denton v. First Nat'l Bank*, 765 F.2d 1295 (5th Cir. 1985). See also *Oster v. Barco Employees' Retirement Plan*, 869 F.2d 1215 (9th Cir. 1988) (employee who voluntarily terminated his employment challenged the denial of lump sum payments). Presumably, Employee Retirement Income Security Act (ERISA) attorneys representing several small businesses have faced similar situations sometime in their careers.

4. Tax law once indirectly mandated discretion in benefit payment. The estate tax regulations under Internal Revenue Code (I.R.C.) section 2039(c) (Supp. 1983) (relating to an exemption from estate taxes for payments from qualified retirement plans other than lump sums), *repealed by* Tax Reform Act of 1984, Pub. L. No. 99-514, 100 Stat. 2868 (codified in scattered sections of 26 U.S.C.), defined a taxable lump sum to include an amount payable as a lump sum distribution at the election of the recipient. The income tax law under I.R.C. § 402(a) (1980), amended to delete the availability language by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified in scattered sections of 26 U.S.C.), included in taxable income those amounts paid or made available by a retirement plan. Writers of retirement plans retained flexibility concerning estate and income taxes by giving the plan administrator the discretion upon request of the employee/beneficiary (1) to grant or deny a lump sum payment and (2) to determine the time of payment of benefits.

ERISA defines a plan administrator as an entity with discretion in the administration of the plan. 29 U.S.C. § 1002(21)(A) (1982).

5. State law indirectly mandated discretion in plan interpretation. Several early decisions by state courts held that, absent fraud, courts could not review a plan administrator's decision if the plan provided that the plan administrator had discretion to determine eligibility and other matters under the plan and that such decision was conclusive. See, e.g., *McNevin v. Solvay Process Co.*, 32 A.D. 610, 613, 53 N.Y.S. 98, 100 (App. Div. 1898), *aff'd*, 167 N.Y. 609, 60 N.E. 1115 (1901); *Clark v. New England Tel. & Tel. Co.*, 229 Mass. 1, 8, 118 N.E. 348, 351 (1918); see also *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301,

those benefits whose total value did not exceed some small specified amount because accounting for these small amounts and maintaining the terminated employee's address is not cost efficient.⁶ This procedure to withhold the employee's benefit payment might succeed if all prior benefit payments fell below the specified sum of the exception. Thus the plan administrator would not be adopting a new policy but merely codifying an existing policy. The procedure might also succeed when large payments might adversely affect investments, such as forcing undervalued asset sales or incurring certificate of deposit early withdrawal penalties.⁷

Some uncertainty exists, however, regarding the circumstances under which a court would uphold the plan administrator's actions if challenged by the employee/beneficiary.⁸ ERISA, the federal statute governing retirement plans, provides that the plan administrator's actions must meet the standard of a prudent man acting in like circumstances.⁹ The courts, however, do not

1304 (9th Cir. 1983) (interpretations must be sustained unless arbitrary or capricious). Without that provision, courts applied the usual contract construction rule, which requires that courts construe the contract against the employer/draftsman. *See, e.g., Menke v. Thompson*, 140 F.2d 786 (8th Cir. 1944); *Sigman v. Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N.E. 2d 878 (1937). Writers of retirement plans could avoid problems of poor draftsmanship by providing the plan administrator with the discretion to interpret the plan and determine any controversy between the plan and the employee/beneficiary.

6. The Internal Revenue Code specifically permits a defined benefit plan to provide immediate payment in a lump sum (rather than in the required qualified joint and survivor annuity) for amounts with a present value (of the annuity) that does not exceed \$3,500. I.R.C. §§ 411(a)(7)(B), 417(e) (1988). The legislative history of these sections explained that the cash-out provision reduced the administrative costs of small annuity payments. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 272 ("A cash-out could be made from the plan . . . based on the reasonable administrative needs of the plan, and, in any event, not in excess of \$1,750 (with respect to the value of the benefit attributable to the employer's contributions)."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5054 [hereinafter H.R. CONF. REP. NO. 1280].

7. *See Denton*, 765 F.2d at 1298. In *Denton*, the court gave both of these reasons for upholding the plan administrators' denial of immediate payment of a large lump sum. *Id.*

8. An employee/beneficiary may bring one of four different actions: (1) to obtain required information; (2) to recover benefits due under the terms of the plan; (3) to enjoin violations of ERISA; and (4) for equitable relief concerning the other actions. 29 U.S.C. § 1132(a)(1), (2) (1982). This Article focuses upon the second action.

9. 29 U.S.C. § 1104(a)(1) states:

Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

use this standard when the challenged act involves plan administrator discretion concerning benefit denial and plan interpretation.¹⁰ Instead they apply the arbitrary and capricious review standard.¹¹ Under this standard, a court will not overturn the plan administrator's action if the administrator's documentation reasonably supports his position.¹²

A. *The Issue: What Standard of Review Applies*

The United States Supreme Court recently delivered its first opinion concerning the ERISA arbitrary and capricious rule.¹³ The Court, however, limited its opinion to plans that fail to grant the plan administrator discretion to determine eligibility or to interpret the plan. Most plans do provide for,¹⁴ or soon will provide for, administrator discretion.¹⁵ Therefore, a ques-

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter [Titles I and IV of ERISA].

Id.

10. See generally Comment, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986, 988 (1986). Several early commentators on the ERISA prudent man rule applied it only in connection with investments. See, e.g., Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1, 12-13 (1977). Others, however, realized the rule covered all fiduciary actions. See, e.g., Dondanville, *The Pension Reform Act: The Civil Liability View*, 43 INS. COUNS. J. 556, 560 (1976).

11. The arbitrary and capricious review standard appears nowhere within ERISA. See, e.g., *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559, 567 (N.D. Ohio 1978) ("This pre-ERISA test of judicial review [the arbitrary and capricious rule] is not implicitly approved or rejected by any part of ERISA.").

12. The plan administrators in *Denton* prevented the former senior vice-president from receiving his immediate lump sum distribution (which exceeded any prior payment) when he began working as the vice-president of a bank in the same area (taking some banking clients with him), although they had paid every prior terminated employee in lump sum. *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1297-98 (5th Cir. 1985). The administrators had an actuary report stating that such a large sum in this case would jeopardize the financial soundness of the defined benefit plan. The financial soundness of the plan, however, was jeopardized by the bank/sponsor who chose to fund the benefit of an aging employee beyond his retirement age, permitted by subsection 412(b)(2)(A)(iii) of the I.R.C. (for past service liability, over a 30-year period), and not by the employee who had no involvement in determining how the bank/sponsor would fund the plan. Moreover, the bank/sponsor may contribute any amounts necessary to make the plan financially sound at any time without incurring a tax. I.R.C. §§ 404(a)(1)(A)(i), 412(a) (1988).

13. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989).

14. See *supra* notes 4-5 and accompanying text.

15. The plan in *Firestone* failed to grant the plan administrator discretion because the employer was unaware that ERISA applied to the plan. The employer then unsuccessfully contended that Congress, through ERISA, granted that discretion. Brief for Petitioners at 10, *Firestone* (No. 87-1054).

tion remains regarding the rule that applies to review of plan administrator discretionary decisions.

B. The Background of Employee Benefit Plans

1. The Players

ERISA generally applies to employee benefit plans, of which there are two types: welfare plans and retirement plans.¹⁶ Normally, an employee benefit plan contains at least a plan and a trust, which govern the benefit plan.¹⁷ This Article, however, treats both the plan and the trust as a unit.¹⁸ Retirement plans consist of two types: (1) defined contribution plans, where the documents define the annual contribution; and (2) defined benefit plans, where the documents define the retirement benefit so that an actuary must determine the annual contribution.¹⁹ The plan's past experience, based on claims payments, will affect the contribution to both welfare plans and defined benefit plans.

Employee benefit plans generally involve four parties: (1) the employer, who makes the contributions to the plan; (2) the plan administrator, who administers the plan; (3) the trustee, who invests the plan's funds; and (4) the employee/beneficiary, who receives the benefits.²⁰ A single party may serve in more than one of these four roles. Plan administrators usually involve four types: (1) the employer;²¹ (2) a management employee, a committee of such persons, or a committee dominated by such persons;²² (3) a service provider, such as an insurance company operating under an administrative contract with the plan;²³ or (4) a committee of equal numbers of

16. 29 U.S.C. § 1002(2), (3) (1982).

17. *Id.* § 1103(a).

18. *Cf.* S. REP. NO. 383, 93d Cong., 1st Sess. 95 n.2 (1973) ("the term 'trust' . . . means plan, whether or not in trust form"), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4978 n.2.

19. 29 U.S.C. § 1002(34)-(35) (1982).

20. See generally Frei & Archer, *Taxation & Regulation of Pension Plans Under the I.R.C.*, 1967 U. ILL. L.F. 691, 692-93 (discussing the four parties in the context of their role in pension plans and the relevant tax consequences).

21. See, e.g., 29 U.S.C. § 1002(16)(A)(ii)(B) (1982).

22. See, e.g., *Varhola v. Doe*, 820 F.2d 809, 812-13 (6th Cir. 1987) (committee of executive employees); *Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620 (11th Cir. 1987) (director of personnel); *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521 (7th Cir. 1986) (committee of management employees), *cert. denied*, 479 U.S. 1094 (1987); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985) (director of personnel).

23. See, e.g., *Eaton v. D'Amato*, 581 F. Supp. 743, 745 (D.D.C. 1980) (service provider acting as claims administrator could be a fiduciary if it had ultimate responsibility for claims determinations).

representatives from management and from the rank and file employees.²⁴ Generally, a plan administrator and a trustee are fiduciaries of a plan to whom ERISA's fiduciary standards apply.²⁵

2. *The Governing Law*

The Federal Government left regulation of employee benefit plans to state common law until Congress passed the LMRA,²⁶ which established requirements for union-negotiated plans. Under the LMRA, both employers and employees contribute funds to employee representatives. These funds are then held in trust for the sole and exclusive benefit of the employees and the basis of benefit payments must be included in a written plan. Additionally, an equal number of employer and employee representatives must administer the plan with an impartial umpire deciding deadlocked matters.²⁷

In disputes involving United Mine Workers' plans,²⁸ federal courts began asserting jurisdiction over plan administrator actions involving union-negotiated plans. Consequently, courts developed the arbitrary and capricious standard of review. Upon disclosure of abuses in the administration and investment of employee benefit plan assets, Congress passed the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA),²⁹ the first piece of legislation to attempt protection of employee/beneficiary benefits in all plans. Under WPPDA, Congress, believing that mere disclosure would permit employee/beneficiaries to police their own plans, required only dissemination of a summary annual report to employees upon written request.³⁰ The inadequacies of WPPDA, however, led to the passage of ERISA, which provides standards for vested benefit preservation, funding adequacy, investment security, and fiduciary conduct,³¹ including a conduct standard for plan administrators. ERISA did not repeal the LMRA provisions.³²

24. See 29 U.S.C. § 186(c)(5) (1982).

25. See 29 U.S.C. § 1002(16), (21)(A) (1982).

26. Labor Management Relations (Taft-Hartley) Act of 1947 (LMRA), ch. 120, § 1, 61 Stat. 136 (codified as amended at 29 U.S.C. § 141 (1982)).

27. 29 U.S.C. § 186(c)(5) (1982).

28. See *Kennet v. United Mine Workers*, 183 F. Supp. 315 (D.D.C. 1960); *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958); *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958); *Barlow v. Roche*, 161 A.2d 58 (D.C. 1960). See also *infra* notes 133-52 and accompanying text.

29. Pub. L. No. 85-836, 72 Stat. 997, 1002 (1958), repealed by Pub. L. No. 93-406, § 111(a)(1), 88 Stat. 851 (1974).

30. H.R. REP. NO. 533, 93d Cong., 2d Sess. 4 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4642 [hereinafter H.R. REP. NO. 533].

31. *Id.* at 5-8, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 4643-46.

32. The only portion of the prior labor laws relating to retirement plans that Congress repealed by ERISA section 444, 29 U.S.C. § 1144 (1982), was the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), leaving intact the LMRA provision, 29 U.S.C. § 186 (1982).

Congress also directed the courts³³ to fashion a federal common law relating to rights and obligations under employee benefit plans.³⁴ Under this directive, the federal circuit courts, until recently, continued to use the LMRA arbitrary and capricious rule rather than the ERISA standards to review plan administrator discretionary decisions concerning plan interpretation and denial of benefits (which usually involves plan interpretation).³⁵

II. THE MEANING OF THE ARBITRARY AND CAPRICIOUS RULE

Whatever the arbitrary and capricious rule may mean, it definitely favors a plan administrator when an employee/beneficiary challenges a plan administrator's discretionary act. The circuit courts have generally held that the rule defers to the plan administrator.³⁶ However, Congress intended ERISA

33. Although ERISA preempts state law that otherwise would apply to employee benefit plans, jurisdiction for employee/beneficiary lawsuits to recover benefits lies with both state and federal district courts. 29 U.S.C. § 1132(e) (1982). For exceptions to ERISA's preemption power, see *id.* § 1144.

34. H.R. CONF. REP. NO. 1280, *supra* note 6, at 302 ("The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 5083. See also 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits) ("A body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."); *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989) (same); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55-57 (1987) (The courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans."); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983) (adopting Sen. Javits' statement); 120 CONG. REC. S29,933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams) (Suits involving claims for benefits "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5188.

35. See generally Comment, *supra* note 10, at 988-98 (tracing the courts' inconsistency in applying the arbitrary and capricious test); Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQ. L. REV. 1033, 1035-41 (1985) (discussing evolution of the arbitrary and capricious standard); Gilbert, *The Responsibilities and Disabilities of Fiduciaries Under ERISA—A Ten-Year Anniversary Review*, 43 N.Y.U. INST. ON FED. TAX'N 33-1, 33-16 to -22 (1985) (discussing proper standard of review of benefit claim denial).

36. See, e.g., *Dellacava v. Painters Pension Fund*, 851 F.2d 22, 25 (2d Cir. 1988) ("very deferential"); *Skelton v. Lowen*, 850 F.2d 200, 201 (4th Cir. 1988) ("great deference"); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 521 (8th Cir. 1988) (applying deferential standard even where plan is ambiguous); *Haeffele v. Hercules Inc.*, 839 F.2d 952, 957 (3d Cir. 1988) ("more deferential"); *Daniel v. Eaton Corp.*, 839 F.2d 263, 267 (6th Cir.) (rejecting *de novo* review), *cert. denied*, 109 S. Ct. 76 (1988); *Shull v. State Mach. Co. Employees Profit Sharing Plan*, 836 F.2d 306, 307 (7th Cir. 1987) ("highly deferential"); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987), *aff'd in part and rev'd in part*, 109 S. Ct. 948 (1989); *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1256 (9th Cir. 1987); *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1304 (5th Cir. 1985) ("deference . . . is absolutely necessary"); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir.) ("highly deferential"), *cert. denied*, 474 U.S. 995 (1985); *Teamster's Local 348 Health & Welfare Fund v. Kohn*

to promote the interests of employee/beneficiaries.³⁷ Thus, the favoritism shown to plan administrators by the courts seems contrary to Congress' purpose.

A. The Three Principles of Deference

The deference that courts have chosen to extend to plan administrators has manifested itself in three ways. First, courts will not permit de novo review of a plan administrator's discretionary action under the arbitrary and capricious rule.³⁸ Courts limit the review of a plan administrator's discretionary decision to those matters and documentation brought to the administrator by the employee/beneficiary and others before the administrator made

Beverage Co., 749 F.2d 315, 321 (6th Cir. 1984) (reversing district court's de novo review and applying deferential standard), *cert. denied*, 471 U.S. 1017 (1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984) ("this deferential standard"), *cert. denied*, 474 U.S. 865 (1985). See also Mandel, *Must Claims Denials Be Upheld Under Arbitrary and Capricious—What Standard of Review Applies to Group Insurance Policies Issued to ERISA Plans?*, 19 FORUM 457 (1984) (suggesting insurance companies convert state insurance contract cases into federal ERISA claims to take advantage of the rule).

37. 29 U.S.C. § 1001(a) (1982) states:

[T]hat owing to the lack of . . . adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that . . . safeguards be provided with respect to the establishment, operation, and administration of such plans . . . it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans

Id. See also *Firestone*, 109 S. Ct. at 955; *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 89-91 (1983).

38. See, e.g., *Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 420 (7th Cir.), *cert. denied*, 109 S. Ct. 145 (1988); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1051 (7th Cir. 1987) (The court is sympathetic to a challenge to the arbitrary and capricious standard, calling it "too lax in some pension cases and too stringent in others"); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987) ("While plaintiffs argue for more of a *de novo* standard, this approach has been rejected in favor of the arbitrary and capricious standard"); *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 532 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Crews v. Central States, S.E. & S.W. Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1076 (10th Cir. 1985); *Denton*, 765 F.2d at 1304 ("In reviewing a decision under the arbitrary and capricious standard, the trial court must focus on the evidence that was before the Plan [administrator] when the final benefit determination was made."); *LeFebvre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984) ("The scope of review is narrow . . . , a trustee's decision is not to be disturbed unless it is arbitrary and capricious"); *Offutt v. Prudential Ins. Co. of America*, 735 F.2d 948, 950 (5th Cir. 1984) ("[T]he reviewing court may not hold a de novo hearing on the question"); *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 394 (7th Cir. 1983); *Wardle v. Central States, S.E. and S.W. Areas Pension Fund*, 627 F.2d 820, 823 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). But see *Redmond v. Burlington N. R. Co. Pension Plan*, 821 F.2d 461, 465 (8th Cir. 1987).

a decision.³⁹ If a trial judge considers other matters and documentation not put before the plan administrator at the time the administrator made a decision, then an appellate court will reverse the trial court.⁴⁰ Thus, a plan administrator need not concern himself with exhausting all possibilities or locating additional information that might favor the employee/beneficiary because courts will only review the administrator's decision based on the documentation the administrator had before him at the time of the decision.⁴¹

Second, although most circuits hold that a plan administrator needs substantial evidence to support his decision,⁴² the decision need not amount to a

39. ERISA provides that the plan administrator must have a procedure for making a claim, communicating the denial to the employee/beneficiary, and appealing the decision for reconsideration. 29 U.S.C. § 1133 (1982); 29 C.F.R. § 2560.503-1 (1988). Only after exhausting this procedure may the employee/beneficiary bring his claim denial before a court for review. *See, e.g., Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 254 (7th Cir. 1983).

40. *Voliva v. Seafarers Pension Plan*, 858 F.2d 195, 196 (4th Cir. 1988) (trial court reversed when it went outside of the administrative record to find against plan administrator). *See Daniel*, 839 F.2d at 266; *Denton*, 765 F.2d at 1304; *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985) ("The trial court erred . . . in admitting into evidence matters not before the plan administrator."); *LeFebvre*, 747 F.2d at 204; *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir.) (trial court reversed when it conducted de novo review), *cert. denied*, 464 U.S. 829 (1983).

41. In *Wolfe*, 710 F.2d at 394, the circuit court reversed and remanded the case to the district court. The circuit court instructed the district court to remand to the fiduciary to consider the new evidence. *Id.* At trial, the district court had considered this evidence in contravention of the general rule against de novo hearings. *Id.*

42. *See Naugle v. O'Connell*, 833 F.2d 1391, 1393-94 (10th Cir. 1987) (basing arbitrary and capricious rule on substantial evidence or error of law); *Holt v. Winpisinger*, 811 F.2d 1532, 1535 (D.C. Cir. 1987) (limiting judicial review of trustee's decision to bad faith or arbitrary and capricious standard which encompasses evidence or legal error); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986) (limiting judicial review to bad faith actions or arbitrary and capricious standard which requires substantial evidence); *Berry*, 761 F.2d at 1007 (same); *Jestings v. New England Tel. & Tel. Co.*, 757 F.2d 8, 11 (1st Cir. 1985) (considerable evidence); *Vorpahl v. Retirement Plan for Employees of Union Oil Co.*, 749 F.2d 1266, 1268 (8th Cir. 1984); *LeFebvre*, 747 F.2d at 204 (arbitrary and capricious standard determined by support of substantial evidence); *Ganze v. Dart Indus., Inc.*, 741 F.2d 790, 793 (5th Cir. 1984) (noting previous approval of substantial evidence or legal error standards); *District 17, Dist. 29, Local Union 7113, & Local Union 6023 v. Allied Corp.*, 735 F.2d 121, 133 (4th Cir. 1984) (substantial evidence must support trustee's decision); *Wolfe*, 710 F.2d at 393 (court should overturn trustee's decision where arbitrary and capricious, lacks substantial evidence or contains an error of law); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (requiring substantial evidence or legal error for judicial review); *Horn v. Mullins*, 650 F.2d 35, 37 (4th Cir. 1981) (same); *Wardle*, 627 F.2d at 824 (substantial evidence).

Although the Sixth and Ninth Circuits do not interpret arbitrary and capricious as encompassing support by substantial evidence, those circuits do recognize lack of support by substantial evidence as an additional ground for overturning the decision of a plan administrator. *See Nevill v. Shell Oil Co.*, 835 F.2d 209, 212 (9th Cir. 1987); *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986);

preponderance of the evidence.⁴³ Thus, to avoid reversal, a plan administrator need only maintain good documentation concerning the reasons and thoughts behind the decision.

Third, a plan administrator must only demonstrate a rational reason for his decision.⁴⁴ Consequently, even if the reviewing court would have de-

Whitworth Bros. Storage Co. v. Central States, S.E. and S.W. Areas Pension Fund, 794 F.2d 221, 232 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986); Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1307 (9th Cir. 1986); Blakeman v. Mead Containers, 779 F.2d 1146, 1149 (6th Cir. 1985); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1093 (9th Cir. 1985); Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985); Teamster's Local 348 Health & Welfare Fund v. Kohn Beverage Co., 749 F.2d 315, 321 (6th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Indus., 703 F.2d 386, 389 (9th Cir. 1983); Fentron Indus. Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1307 (9th Cir. 1982). Frequently, the Tenth Circuit adopts a position similar to the Sixth and Ninth Circuits. See Sage v. Automation, Inc. Pension Plan and Trust, 845 F.2d 885, 895 (10th Cir. 1988); Peckham v. Board of Trustees of Int'l Bhd. of Painters, 719 F.2d 1063, 1066 (10th Cir.), *op. supp.*, 724 F.2d 100 (10th Cir. 1983); Peckham v. Board of Trustees of Int'l Bhd. of Painters, 653 F.2d 424, 426 (10th Cir. 1981).

The Eighth Circuit has suggested that less than substantial evidence suffices to uphold the plan administrator's decision. See *Severs v. Allied Constr. Servs., Inc.*, 795 F.2d 649, 650 (8th Cir. 1986) (requires evidence supporting decision); *Lawrence v. Westerhaus*, 780 F.2d 1321, 1323 (8th Cir. 1986) (some evidence); *Torimino v. United Food & Commercial Workers Int'l Union Indus. Pension Fund*, 712 F.2d 882, 883 (8th Cir. 1983) (*per curiam*) (adequate evidence).

The Fifth Circuit has stated specifically that the substantial evidence requirement is a separate ground from arbitrary and capricious and has refused to require substantial evidence. *Offutt*, 735 F.2d at 950.

In *Brown*, 797 F.2d at 526-27, the court rejected the argument that a meaningful review of a plan administrator's decision was difficult because virtually some evidence always exists to justify the plan administrator's decision. While the court labeled this argument a misinterpretation, statements of other circuits suggest the same conclusion. However, the Seventh Circuit stated specifically that some evidence was not sufficient because the arbitrary and capricious rule required substantial evidence. *Id.*

43. See *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). This is the court's understanding in an LMRA case. See also *Tomlin v. Board of Trustees of Constr. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978) ("[Substantial evidence] consists of more than a scintilla but somewhat less than a preponderance of evidence."); *Kenet v. United Mine Workers*, 183 F. Supp. 315, 318 (D.D.C. 1960) (adopting the substantial evidence requirement for the arbitrary and capricious rule). The employee/beneficiary, however, does have to prove his case by a preponderance of the evidence under the arbitrary and capricious rule. See *Bova v. American Cyanamid Co.*, 662 F. Supp. 483, 492 (S.D. Ohio 1987); *Adam v. Joy Mfg. Co.*, 651 F. Supp. 1301, 1307 (D.N.H. 1987).

44. The circuit courts have held as follows: *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 521 (1st Cir. 1988) (where both parties offer rational but conflicting plan interpretations, one trustee's interpretation will control); *Jestings*, 757 F.2d at 9 (same); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (same); *Miles*, 698 F.2d at 599 (courts should not disregard a plan committee's reasonable interpretation), *cert. denied*, 464 U.S. 829 (1983); *Shiffler v. Equitable Life Assurance Soc'y of the United States*, 838 F.2d 78, 83 (3d Cir. 1988) (trustee's interpretation cannot be said to violate fiduciary duty unless it is arbitrary and capricious); *Edwards v. Wilkes-Barre*

cided the claim differently, a plan administrator's decision will stand, absent irrationality.⁴⁵ Thus plan administrators must only develop some reasonable ground for their discretionary decisions. Only after the employee/beneficiary makes a *prima facie* showing of unreasonable action does the plan administrator have the burden of showing some rational basis for the action taken.⁴⁶

Publishing Pension Trust, 757 F.2d 52, 56 (3d Cir.) (same), *cert. denied*, 474 U.S. 843 (1985); Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 187 (3d Cir. 1984) (same); Skelton v. Lowen, 850 F.2d 200, 201 (4th Cir. 1988) (trustee's determination can be overruled only if arbitrary and capricious); Witmeyer v. Kilroy, 788 F.2d 1021, 1025 (4th Cir. 1986) (same); Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1149 (4th Cir. 1985) (same), *cert. denied*, 477 U.S. 903, *aff'd sub nom.* Brooks v. Burlington Indus., Inc., 477 U.S. 901 (1986); Thompson v. Asbestos Workers Local No. 53 Pension Fund, 716 F.2d 340, 343 (5th Cir. 1983) (courts defer to a trustee's reasonable interpretation); Varhola v. Doe, 820 F.2d 809, 816 (6th Cir. 1987) (a case will be remanded only if the record is so inadequate that the trustee's motivation is not determinable); Van Boxel v. Journal Co. Employee's Pension Trust, 836 F.2d 1048, 1051 (7th Cir. 1987) (arbitrary and capricious contemplates a standard of total unreasonableness); Shull v. State Mach. Co., Employees Profit Sharing Plan, 836 F.2d 306, 308 (7th Cir. 1987) (where denial of a claim is based on a reasonable interpretation, it will not be set aside); Brown, 797 F.2d at 529 (same); Sly v. P.R. Mallory & Co., Inc., 712 F.2d 1209, 1211 (7th Cir. 1983) (same); Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 522 (8th Cir. 1988) (court will adhere to an arbitrary and capricious standard); Atkinson v. Sheet Metal Workers' Trust Funds, 833 F.2d 864, 865 (9th Cir. 1987) (arbitrary and capricious standard means any reasonable resolution by the trustees of an ambiguity will be upheld); Bance v. Alaska Carpenters Retirement Plan, 829 F.2d 820, 822 (9th Cir. 1987) (same); McDaniel v. National Shopmen Pension Fund, 817 F.2d 1370, 1373 (9th Cir.) (same), *vacated, appeal dismissed*, 820 F.2d 407 (9th Cir. 1987); Fielding v. International Harvester Co., 815 F.2d 1254, 1256 (9th Cir. 1987) (same); Dockray, 801 F.2d at 1152 (same); Hancock, 787 F.2d at 1308 (same); Ellenburg, 763 F.2d at 1096 (same); Jung, 755 F.2d at 713 (same); Music v. Western Conference of Teamsters Pension Trust Fund, 712 F.2d 413, 419 (9th Cir. 1983) (same); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 (9th Cir. 1983) (same); Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 439-40 (9th Cir. 1980) (same). See also Pokratz, 771 F.2d at 209 (a decision is not arbitrary and capricious when a court can read the plan administrator's reason without a loud guffaw).

45. See Whipp v. Seafarers Vacation Plan, 832 F.2d 853, 855 (4th Cir. 1987) (court may not substitute its own judgment); Schwartz v. Newsweek, Inc., 827 F.2d 879, 883 (2d Cir. 1987); Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 577 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988); Stewart v. National Shopmen Pension Fund, 795 F.2d 1079, 1083 (D.C. Cir. 1986); Blakeman, 779 F.2d at 1150 (court may not substitute its own judgment); Denton v. First Nat'l Bank, 765 F.2d 1295, 1304 (5th Cir. 1985) (no second guessing by the trial court); Gaines v. Amalgamated Ins. Fund, 753 F.2d 288, 289 (3d Cir. 1985); Ganze, 741 F.2d at 793; Miles, 698 F.2d at 599; Elser v. I.A.M. Nat'l Pension Fund, 684 F.2d 648, 654 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); Dennard, 681 F.2d at 314.

46. Mosley v. National Maritime Union Pension & Welfare Plan, 451 F. Supp. 226 (E.D.N.Y. 1978) (ERISA) (requiring plaintiff to show trustee's actions were beyond their powers and inconsistent with the intended purpose of the plan); see also Roark v. Lewis, 401 F.2d 425, 429 (D.C. Cir. 1968) (LMRA) (holding that plaintiff must produce enough evidence so that court may measure trustee's actions against existing standards of arbitrary and capricious conduct).

B. Policy Reasons for Applying the Arbitrary and Capricious Rule

In the early cases, the circuit courts seldom discussed or elaborated on the policy reasons for applying the arbitrary and capricious rule to ERISA cases. Rather, the courts assumed that the rule from the LMRA cases applied in ERISA disputes. Only after employing the arbitrary and capricious standard of review did judges begin to explore the validity of the result. By later supplying reasons, the courts implied that they recognized problems with the rule for a non-union-negotiated ERISA plan.⁴⁷ Several circuit courts noted that the arbitrary and capricious rule "strikes a balance between excessive judicial intervention in the discharge of trustees' duties, on the one hand, and abdication of traditional judicial control of fiduciaries' actions, on the other."⁴⁸ These courts provided no reasons explaining their desire for this balance for a plan subject to ERISA. The reason for the absence lies with the source cited for the balance idea,⁴⁹ which deals with a union-negotiated pension plan in the pre-ERISA situation. The originating court noted that the arbitrary and capricious rule, in striking the balance between excessive judicial intervention and abdication of traditional judicial

47. See, e.g., *Van Boxel*, 836 F.2d at 1052 (courts borrowed the LMRA rule "apparently without the courts' noticing that employers often held the whip hand in ERISA trusts," and that "[t]ransposed to the ERISA setting, the arbitrary and capricious standard may be inapt, a historical mistake, or a mechanical extrapolation from different settings"); *Shull*, 836 F.2d at 307 (there is "a growing restiveness in cases where the trustees seem not to be true neutrals in the disputes they are called on to resolve"); *Varhola*, 820 F.2d at 813 ("[w]here we writing on a clean slate, we might well be persuaded that [a] stricter standard of review should apply").

48. *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) (using the rule to uphold a policy in the nature of a prohibited badboy provision when dealing with a plan administrator's denial of the acceleration of benefits to an employee who quit, taking business to a competitor). See also *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 100 (5th Cir. 1979) (use of rule to uphold policy suspending benefits to retiree who returns to type of employment for which benefits were originally granted); *Brown*, 797 F.2d at 526 (use of rule to uphold denial of disability benefits by plan administrators implementing pension plan definition of disability).

Other circuit courts, when using this balance as a reason for the rule, only mention the excessive judicial intervention portion. See *Daniel v. Eaton Corp.*, 839 F.2d 263, 267 (6th Cir.), cert. denied, 109 S. Ct. 76 (1988); *Cook v. Pension Plan for Salaried Employees*, 801 F.2d 865, 870 (6th Cir. 1986); *Dennard*, 681 F.2d at 313; *Ganze*, 741 F.2d at 793; *Offutt v. Prudential Ins. Co. of America*, 735 F.2d 948, 950 (5th Cir. 1984); *Miles*, 698 F.2d at 599. See also *Bueneman v. Central States, S.E. & S.W. Areas Pension Fund*, 572 F.2d 1208, 1209 (8th Cir. 1978) (noting that court intervention in trustee's decisions is limited). This shortened version defers to congressional intent to provide that judicial control. See, e.g., H.R. REP. NO. 533, *supra* note 30, at 12 ("[E]ven assuming that the law of trusts is applicable, without . . . access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 4650.

49. *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977).

control, was consistent with federal labor policy.⁵⁰ Federal labor policy requires the joint labor-management administration of union plans under the LMRA and the arbitration process to resolve disputes in lieu of continual lawsuits.⁵¹ Thus, because the usual labor-management administrative control and dispute mechanisms are unavailable for a non-union-negotiated ERISA plan, it is highly questionable whether the policy reason applicable to a union-negotiated plan under the LMRA should also apply to a non-union-negotiated ERISA plan.

Furthermore, when Congress enacted ERISA, it sought to "codif[y] and [make] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."⁵² Under the law of trusts, the judiciary maintained strict control over the fiduciary.⁵³ When courts refused to exercise this supervisory role in ERISA cases, that is, when they abdicated the traditional judicial control of fiduciaries' actions, they apparently acted in a manner contrary to the underlying purpose of Congress in enacting ERISA. Nonetheless, some circuit courts have attempted to provide some obviously erroneous reasons for the refusal to intervene. First, courts have asserted their desire to defer to others with the intelligence⁵⁴ or experience⁵⁵ to oper-

50. *Id.*

51. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (courts are to defer to private settlement of labor disputes); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 246 (1971) ("[a] stricter standard . . . would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs").

52. H.R. REP. NO. 533, *supra* note 30, at 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4649. See also *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

53. See *infra* note 165 and accompanying text.

54. *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986) (application of the arbitrary and capricious rule to ERISA plans is analogous to application of the same rule in administrative law: to take into account the expertise of a professional operating in a complex field); *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982) (presumed expertise of the administrators), *cert. denied*, 464 U.S. 813 (1983).

A plan administrator frequently possesses the needed expertise only if he consults with someone else who possesses that expertise. In particular, plan administrators of small plans seldom have the opportunity to confront employee benefit plan problems and so must constantly consult with accountants and lawyers to handle those problems. Plan administrators of large plans typically use lower echelon management employees, who must constantly consult with the corporate counsel concerning the numerous problems. Nothing prevents a court from consulting the same experts.

Moreover, few, if any, plan administrators have the same degree of disinterest in the decision as a public administrative body. Plan administrators of non-union-negotiated plans are typically corporate employees or service providers hired solely as plan administrators. The jobs, compensation, or advancement of these individuals depend on retaining the employer's favor by keeping expenses of the plan low, including benefit payments.

ate in a field as complex as ERISA. These reasons, however, do not prevent the courts from handling antitrust and other complex cases.⁵⁶

Second, some courts have refused to intervene because ERISA requires plan administrators to balance the interests of the various parties to the plan, including present beneficiaries and future beneficiaries,⁵⁷ and the payment of benefits while guarding the plan's financial security.⁵⁸ However, only the lack of future employer contributions causes the administrator to guard zealously the plan's financial security, and ERISA requires the plan administra-

55. *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985) (the rule insures that the decision will be made by those whose experience in such matters is daily and continual rather than by the court whose experience is episodic); *see also* *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1148 (4th Cir. 1985), *cert. denied*, 477 U.S. 903, *aff'd sub nom.* *Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986) (upholding rule in order to maintain consistent administration).

Daily and continual experience, however, definitely does not reflect the case of small plans that have few employee/beneficiaries and plans administered by or using some high management official, such as the personnel director, as the plan administrator, who relies on underlings. *Cf. Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985) (director of personnel processing retirement and benefit requests); *Chilton v. Savannah Foods & Indus.*, 814 F.2d 620 (11th Cir. 1987) (corporate board determining eligibility of subsidiary's retirees for pension plan).

56. Federal court procedure provides for referral of complex matters to special masters, but not routinely and only (in actions tried without a jury) in matters of account and of difficult computation of damages. FED. R. CIV. P. 53. Federal courts will usually try an ERISA matter under the arbitrary and capricious rule without a jury. *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Even in antitrust cases, the referral cannot be made routinely without a showing of the special need in that case. *See, e.g.,* *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 712 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

57. *See* *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985); *Michota v. Anheuser-Busch, Inc.*, 755 F.2d 330, 336 (3d Cir. 1985); *Struble v. New Jersey Brewery Employees' Welfare Plan*, 732 F.2d 325, 333 (3d Cir. 1984). *See also* *Daniel v. Eaton Corp.*, 839 F.2d 263, 267 (6th Cir.) (overturning district court's granting of de novo review to avoid excessive judicial interference with trustee's administration of pension plans), *cert. denied*, 109 S. Ct. 76 (1988).

Gayosh v. Lewis, 410 F.2d 262, 266 (D.C. Cir. 1969), which involved a pre-ERISA union-negotiated plan and interpreted the purpose of the "solely and exclusive benefit" provision of section 302(c)(5) of LMRA, 29 U.S.C. § 186(c)(5) (1982), provided the source for the second policy reason for refusing to intervene. *See Elser*, 684 F.2d at 656. Although section 302(c)(5) and ERISA share common language, it is not at all clear that the underlying purposes of the two statutes are the same. *See* H.R. REP. NO. 533, *supra* note 30, at 4 ("[The LMRA] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct."), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4642.

58. *Michota*, 755 F.2d at 336 (justifying application of arbitrary and capricious rule because trustees' conflicting obligations force them to avoid decisions that are irrational or contrary to the intent of pension plans).

tor to operate the plan "for the exclusive purpose . . . of providing benefits to participants and their beneficiaries," not the employer.⁵⁹

Third, courts have correctly asserted that ERISA requires plan administrators to process claims.⁶⁰ However, part of the processing procedure mandated by ERISA includes a federal right of action for denied claims, which undermines the policy for applying the arbitrary and capricious rule.⁶¹

The circuit courts, therefore, have not agreed upon a policy reason for the application of the arbitrary and capricious rule. Perhaps this results from a lack of clarity among the circuits regarding the real function of the rule. The various reasons set forth by the circuits suggest that the main problem is one of determining the plan administrator's role, which is compounded by the desire not to emasculate that role. Certain circumstances, however, may demand emasculation of the administrator's role and mandate use of some standard of review other than the arbitrary and capricious standard.

C. *Inconsistent Statements of the Arbitrary and Capricious Rule*

Not only are the various circuit courts unclear as to the public policy advanced by the arbitrary and capricious rule, they also vary as to exactly what constitutes arbitrary and capricious. More particularly, courts have not agreed on the circumstances required to overturn a plan administrator's discretionary decision.⁶² This confusion is manifest in the terms used by the courts to refer to the arbitrary and capricious rule. The First, Third, Fourth, Fifth, and Eleventh Circuits predominantly quote the rule as merely

59. 29 U.S.C. § 1104(a)(1)(A) (1982). See also 29 U.S.C. § 1103(c)(1) (1982) (plan assets "shall never inure to the benefit of any employer"). Moreover, employers draft the plan, or, at least, agree to it. Therefore, they can avoid any problems by carefully drafting the plan.

60. *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1304 (5th Cir. 1985) (Congress intended to give administrators primary responsibility for processing claims); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1304 n.3 (9th Cir. 1983) (trustees have discretion in administering plan). See also *Daniel*, 839 F.2d at 267 (efficient plan administration); *Cook v. Pension Plan for Salaried Employees*, 801 F.2d 865, 871 (6th Cir. 1986).

61. 29 U.S.C. § 1132(1)(b) (1982). See also 29 U.S.C. § 1024(c) (1982); 29 C.F.R. § 2520.102-3(t)(7)(1)-(2) (1988) (dealing with the statement of ERISA rights that must be given to all participants).

62. The Supreme Court referred to these inconsistencies as the reason for its first review of the rule. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 953 (1989). The Ninth Circuit has also admitted that the correct review standard is unclear in that circuit. *Pilon v. Retirement Plan for Salaried Employees of Great N. Nekoosa Corp.*, 861 F.2d 217, 218 (9th Cir. 1988). Furthermore, commentators have noted this confusion. See, e.g., Gilbert, *supra* note 35, at 33-19; Comment, *supra* note 10, at 995. Even with virtually the same facts, courts have reached different conclusions. Compare *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) (upholding district court's affirmance of trustee's denial of retirement benefits), *cert. denied*, 449 U.S. 1112 (1981) with *Richardson v. Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981) (affirming district court's reversal of trustee's denial of retirement benefits).

arbitrary and capricious. The Second, Sixth, Seventh, and District of Columbia Circuits also commonly cite the rule this way. The other circuits, however, sometimes add other items, which they may or may not deem equivalent to arbitrary and capricious.⁶³

The most commonly added item is a requirement of bad faith.⁶⁴ Because courts generally asserted bad faith as the sole ground for overturning a plan administrator's decision under pre-ERISA state law,⁶⁵ courts generally consider "bad faith" as being distinct from "arbitrary and capricious."⁶⁶ The Eighth Circuit frequently adds the term "abuse of discretion" to its understanding of arbitrary and capricious.⁶⁷ The terms "abuse of discretion" and

63. The circuit courts have occasionally indicated that the term "arbitrary and capricious" encompasses a particular addition. See, e.g., *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (arbitrary and capricious violation includes an abuse of discretion); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985) (court refused to vary standard to include bad faith because arbitrary and capricious encompasses bad faith), *cert. denied*, 477 U.S. 903, *aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986).

64. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989); *Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 (9th Cir. 1988); *MacDonald v. Pan Am. World Airways, Inc.*, 859 F.2d 742, 744 (9th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987); *Rhoton v. Central States, S.E. & S.W. Areas Pension Fund*, 717 F.2d 988, 989 (6th Cir. 1983); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 698 F.2d 802, 806 (6th Cir. 1983), *rev'd*, 472 U.S. 559 (1985); *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 915 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Van Gunten v. Central States, S.E. & S.W. Areas Pension Fund*, 672 F.2d 586, 587 (6th Cir. 1982); *Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 419 (7th Cir. 1986), *cert. denied*, 109 S. Ct. 145 (1988). See also *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.) (refusing to apply a bad faith test, depicted as a more stringent good faith test, in lieu of arbitrary and capricious standard), *cert. denied*, 109 S. Ct. 529 (1988); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1049-50 (7th Cir. 1988) (noting that other courts add bad faith as an additional ground for overturning the plan administrator's decision); *Holland*, 772 F.2d at 1149.

The bad faith addition is a remnant of the old pre-ERISA state law. See, e.g., *McNevin v. Solvay Process Co.*, 32 A.D. 610, 53 N.Y.S. 98 (App. Div. 1898), *aff'd*, 167 N.Y. 609, 60 N.E. 1115 (1901). The LMRA rule also encompassed the bad faith addition, see *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962), but was preempted by ERISA. 29 U.S.C. § 1144 (1982).

65. See, e.g., *Texaco, Inc. v. Romine*, 536 S.W.2d 253 (Tex. Civ. App.-El Paso 1976, writ n.r.e.). This is the contract rule for overturning a decision of a party charged with discretion, such as an architect in a construction contract. See *Clark v. New England Tel. & Tel. Co.*, 229 Mass. 1, 9, 118 N.E. 348, 350 (1917).

66. *Smart*, 868 F.2d at 936; *Van Boxel*, 836 F.2d at 1049-50; *contra Holland*, 772 F.2d at 1149.

67. *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986); *Lawrence v. Westerhaus*, 780 F.2d 1321, 1322 (8th Cir. 1985); *Central Hardware Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 770 F.2d 106, 109 (8th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Torimino v. United Food & Commercial Workers Int'l Union, Indus. Pension Fund*, 712 F.2d 882, 883 (8th Cir. 1983); *In re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982); *Quinn v. Burlington N., Inc. Pension Plan*, 664 F.2d 675, 678 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981); *Bueneman v. Central States, S.E. &*

"arbitrary and capricious" both originated from trust law,⁶⁸ therefore, courts generally consider them equal.⁶⁹

Some courts also engraft the term "unsupported by substantial evidence" onto the definition of arbitrary and capricious.⁷⁰ Yet, "unsupported by substantial evidence" is equivalent to "arbitrary and capricious" in most circuits.⁷¹ Moreover, courts often add the phrase "erroneous with respect to a question of law,"⁷² which, in combination with "unsupported by substantial evidence," is equivalent to "arbitrary, capricious, or bad faith."⁷³

Some circuit courts add several of these terms to the arbitrary and capricious rule. The predominant practice in the Tenth Circuit, for example, is to add both "unsupported by substantial evidence" and "erroneous with respect to a question of law."⁷⁴ Several courts supply other double combina-

S.W. Areas Pension Fund, 572 F.2d 1208, 1209 (8th Cir. 1978). *See also Hickman*, 840 F.2d at 566 (cannot have an arbitrary and capricious violation without an abuse of discretion).

68. The Restatement (Second) of Trusts provides the source of the "abuse of discretion" element. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). *See Brune v. Morse*, 475 F.2d 858, 860 n.2 (8th Cir. 1973) (an LMRA case). Trust law also provides the source of the arbitrary and capricious standard. *See, e.g., Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958). *See also infra* notes 133-52 and accompanying text.

69. *See e.g., Hickman*, 840 F.2d at 566.

70. District 17, Dist. 29, Local Union 7113, and Local Union 6023 v. Allied Corp., 735 F.2d 121, 133 (4th Cir. 1984); *Short v. United Mine Workers 1950 Pension Trust*, 728 F.2d 528, 533 (D.C. Cir. 1984); *Maggard v. O'Connell*, 671 F.2d 568, 570 (D.C. Cir. 1982). *See also Van Boxel*, 836 F.2d at 1050 (noting that some circuits add the term "unsupported by substantial evidence" as an additional ground for overturning the plan administrator's decision).

71. *See supra* note 40 and accompanying text.

72. *Bance v. Alaska Carpenters Retirement Plan*, 829 F.2d 820, 823 (9th Cir. 1987) (contrary to law); *Budwig v. Natelson's, Inc. Profit Sharing Retirement Plan*, 720 F.2d 977, 978 (8th Cir. 1983) (inconsistent with ERISA); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1304 (9th Cir. 1983); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 654 (9th Cir. 1981) (contrary to law).

The "arbitrary and capricious" rule, as applied under the LMRA, provides the source of the "erroneous with respect to a question of law" phrase. *See Danti v. Lewis*, 312 F.2d 345, 348 (D.C. Cir. 1962).

73. *See Danti*, 312 F.2d at 348.

74. *Torix v. Ball Corp.*, 862 F.2d 1428, 1429 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988); *Peckham v. Board of Trustees of the Int'l Bhd. of Painters & Allied Trades Union & Indus. Nat'l Pension Fund*, 719 F.2d 1063, 1066 (10th Cir.), *op. supp.*, 724 F.2d 100 (10th Cir. 1983); *Peckham v. Board of Trustees of the Int'l Bhd. of Painters & Allied Trades Union & Indus. Nat'l Pension Fund*, 653 F.2d 424, 426 (10th Cir. 1983).

This combination also appears in other circuits. *See, e.g., Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 525 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 232 n.15 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1307 (9th Cir. 1986); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1093 (9th Cir. 1985); *Teamster's Local, 348 Health & Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315, 321 (6th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985);

tions such as: (1) "bad faith" and a version of "erroneous with respect to a question of law";⁷⁵ or (2) "bad faith" and "fraud."⁷⁶ The Ninth Circuit commonly adds to the arbitrary and capricious standard some combination of the following: "unsupported by substantial evidence"; "erroneous with respect to a question of law"; and "bad faith."⁷⁷

Because courts sometimes recognize the combining of additional elements as additional grounds for overturning the plan administrator's discretionary decisions, different courts have subjected the plan administrator's decisions to alternate types of review.⁷⁸ For the purposes of this Article, then, the arbitrary and capricious rule will encompass only the absence of de novo review, the substantial evidence requirement, and the reasonable explanation. These elements represent those that came from the LMRA rule and the first judicial treatments of the arbitrary and capricious rule.

D. Limits on the Applicability of the Rule

Notwithstanding the various interpretations of what constitutes the arbitrary and capricious rule, some circuits have limited its use by restricting the situations under which a court will apply the rule or by adding lengthy conditions for its application. For instance, the Third Circuit limits the application of the rule to individual claims that involve balancing opposing beneficiaries' interests.⁷⁹ When legal actions involve the beneficiaries as a class against the interests of some third party, however, the Third Circuit will apply the ERISA statutory standards, namely the prudent man rule.⁸⁰

Odom v. United Mine Workers Health & Retirement Funds, 687 F.2d 843, 846 (6th Cir. 1982).

75. Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir.) (contrary to law), *cert. denied*, 109 S. Ct. 76 (1988).

76. Martinez v. Swift & Co., 656 F.2d 262, 263 (7th Cir. 1981). "Fraud" derives from the pre-ERISA state law. See, e.g., Dowling v. Texas & N.O.R. Co., 80 S.W.2d 456 (Tex. Civ. App.-Galveston 1935, writ ref'd).

77. Pilon v. Retirement Plan for Salaried Employees of Great N. Nekoosa Corp., 861 F.2d 217, 218 (9th Cir. 1988); Johnson v. District 2 Marine Engineers Beneficial Ass'n-Associated Maritime Officers, Medical Plan, 857 F.2d 514, 516 (9th Cir. 1988); Nevill v. Shell Oil Co., 835 F.2d 209, 212 (9th Cir. 1987); Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986); Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1152 (9th Cir. 1986); see also Pierre v. Connecticut Gen. Life Ins. Co., 866 F.2d 141, 143 (5th Cir. 1989); Blakeman v. Mead Containers, 779 F.2d 1146, 1149 (6th Cir. 1985).

78. Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1049-50 (7th Cir. 1987); Sharron v. Amalgamated Ins. Agency Servs., Inc., 704 F.2d 562, 564 (11th Cir. 1983).

79. Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984). Other circuits have refused to adopt this limitation. See Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1148 (4th Cir. 1985), *cert. denied*, 477 U.S. 903, *aff'd sub nom.* Brooks v. Burlington Indus., Inc., 477 U.S. 901 (1986).

80. Struble, 732 F.2d at 334.

The court, amazingly, will apply the statutorily mandated standard for some discretionary plan administrator decisions, yet retain a court created exception to the standard for other discretionary decisions. The Third Circuit also refuses to apply the arbitrary and capricious rule if the plan administrator possesses a financial interest in the outcome.⁸¹

The Fifth Circuit does not require substantial evidence under the arbitrary and capricious rule,⁸² and therefore, has adopted several factors for deter-

81. *Haeffele v. Hercules, Inc.*, 839 F.2d 952, 957 (3d Cir. 1988) (holding that questions of fact preclude summary judgment on ERISA claims and that a plan administrator's interpretation of a pension plan is subject to de novo review); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 145 (3d Cir. 1987) (ruling that the arbitrary and capricious standard does not apply when an employee is denied severance pay benefits by employer/administrator of an unfunded pension fund), *aff'd in part and rev'd in part*, 109 S. Ct. 948 (1989); *accord Eckersley v. WGAL TV, Inc.*, 831 F.2d 1204, 1208 (3d Cir. 1987) (relying on *Bruch's* disapproval of the arbitrary and capricious standard and holding that an employee's settlement in a suit for profit-sharing benefits under an employment contract is included in final average earnings, for purposes of calculating the employee's pension benefits). *Contra Shiffler v. Equitable Life Assurance Soc'y*, 838 F.2d 78, 83 n.7 (3d Cir. 1986) (refusing to apply de novo review and suggesting that where the situation involves a personal claim for benefits, the applicable standard is "clear error" and "rational basis"). Other circuits have refused to adopt this limitation. *See, e.g., Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108, 110 (1st Cir. 1988) (noting that the Third Circuit applies de novo review only in some circumstances and holding that the arbitrary and capricious standard applies in an action by an injured employee to recover monies withheld by his insurance carrier to offset workers compensation payments); *Pierre*, 866 F.2d at 143 (noting that "[t]he [arbitrary and capricious] standard of review has elasticity to allow reviewing courts to account for possibilities for self-interest"); *South Cen. United Food & Commercial Workers Unions v. C. & G. Markets, Inc.*, 836 F.2d 221, 224 (5th Cir.), *cert. denied*, 108 S. Ct. 2823 (1988); *Shull v. State Mach. Co., Employees Profit Sharing Plan*, 836 F.2d 306, 308 (7th Cir. 1987) (holding that judicial review is severely limited where a claim under a profit-sharing plan is brought by an "important executive" who, as an original participant in the plan, consents in advance to have plan disputes resolved by fellow executives); *Van Boxel*, 836 F.2d at 1049 (suggesting that the arbitrary and capricious standard is a sliding scale of judicial review that requires a more penetrating review where there is greater suspicion of bias); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 522 (8th Cir. 1988) (acknowledging the merits of the Third Circuit's de novo review in *Bruch*, but noting that the traditional standard of arbitrary and capricious is the standard most courts follow). The court held that an employer's decision to deny separation benefits to former employees who were offered like jobs with the purchasing company was not arbitrary and capricious. *Agee v. Armour Foods Co.*, 834 F.2d 144, 145 (8th Cir. 1987); *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988) (citing Judge Posner's sliding-scale analysis in *Van Boxel* and characterizing the dispute here as one requiring the trustee to balance interests between present and future claimants such that the arbitrary and capricious standard is sufficiently flexible to allow a reviewing court to adjust for a trustee's bias).

82. *Offutt v. Prudential Ins. Co. of America*, 735 F.2d 948, 950 (5th Cir. 1984) (citing *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir. Feb.) (noting that the Fifth Circuit is not free to adopt the substantial-evidence standard), *cert. denied*, 454 U.S. 836 (1981)).

mining whether an action is arbitrary and capricious.⁸³ The Ninth Circuit adopted a less deferential standard when a plan administrator had a financial interest in the outcome, and reasoned that the arbitrary and capricious rule encompasses such a limitation.⁸⁴ The Ninth Circuit also has shifted the burden of proof to the plan administrator to show a reasonable purpose if a plan excludes a disproportionate number of employees.⁸⁵ The District of Columbia Circuit suggested that it might limit the arbitrary and capricious rule to

83. *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (citing *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979)). The factors include: "(1) uniformity of construction; (2) fair reading and reasonableness of that reading; and (3) unanticipated costs." Other circuits have adopted or mentioned these factors as part of the rule. *See Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 420 (7th Cir.) (mentioning the *Bayles* factors for the purpose of determining when to apply the arbitrary and capricious standard), *cert. denied*, 109 S. Ct. 145 (1988); *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1498 (11th Cir. 1987) (using the *Bayles* factors and holding that an employer's decision to give severance pay to only those employees who are offered jobs by the purchasing company is arbitrary and capricious).

84. *Pilon v. Retirement Plan for Salaried Employees of Great N. Nekoosa Corp.*, 861 F.2d 217, 219 (9th Cir. 1988) (noting that the Ninth Circuit will use the arbitrary and capricious language and, at the same time, give "closer scrutiny" to the decision of an employer/plan administrator); *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1256 (9th Cir. 1987) (giving an employer/administrator's decision less deference where the decision affects the employer financially); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 (9th Cir. 1986) (extending the "closer scrutiny" theory to a situation involving an administrator's non-financial decision in the context of an unusually bitter and violent strike); *Jung v. FMC Corp.*, 755 F.2d 708, 712 (9th Cir. 1985) (holding that if "the employer's denial of benefits to a class avoids a very substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review"). The less deferential standard merely means that the trial court should be appreciably more critical of the reasons given for the action by the plan administrator and less willing to resolve all ambiguities in the plan administrator's favor. *Dockray*, 801 F.2d at 1153. Further, this approach applies only if the conflict is between the plan administrator and the employee/beneficiary. *Oster v. Barco Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988) (refusing to apply the "less deference" standard to an employer/administrator's decision where the conflict at issue is between past and future beneficiaries rather than between employer and beneficiaries).

85. *See, e.g., Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) (suggesting that the court should sustain a pension plan's interpretation of its own regulations as long as it is reasonable); *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982) (holding that a rule which denies pensions to employees who have worked a substantially greater time than others who receive benefits shifts the burden to the trustees to show a rational connection between the rule and the fund's purpose), *cert. denied*, 464 U.S. 813 (1983); *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1982) (citing *Ponce v. Construction Laborers*, 628 F.2d 537 (9th Cir. 1980) (holding that once a plaintiff demonstrates that a vesting requirement excludes an unusually high percentage of plan participants, the court must shift the burden to the plan's trustees to show reasonableness of the requirement)); *Burroughs v. Board of Trustees Pension Trust*, 542 F.2d 1128, 1130 (9th Cir. 1976) (recognizing the sizeable exclusion/reasonable justification standard), *cert. denied*, 429 U.S. 1096 (1977).

situations not involving a plan administrator's conflict of interest.⁸⁶ Thus, a pattern has emerged of applying a more stringent review primarily where a plan administrator has a conflict of interest, namely a financial interest, in the outcome of the discretionary decision.

III. DISSATISFACTION WITH THE ARBITRARY AND CAPRICIOUS RULE

In light of the fact that the arbitrary and capricious rule favors the plan administrator, employee/beneficiaries recently have attempted to convince courts either to adopt a more even-handed rule or to declare that the rule is inappropriate in their situation.⁸⁷ The general jurisprudential method⁸⁸ used to distinguish prior cases and thereby carve out a subset of discretionary plan administrator decisions to which the arbitrary and capricious rule does not apply, has involved recognizing new fact patterns not previously noticed by courts predisposed to use the rule. The distinctions fall into four categories of cases that: (1) treat the plan as an ordinary contract, not a trust; (2) involve a conflict between a third party and the beneficiaries as a class, not individually; (3) deal with an unfunded plan where the employer pays the liabilities out of its general assets; and (4) involve a financially interested, not disinterested, plan administrator. Only the second and fourth distinctions have enjoyed limited success.

86. *Foltz v. U.S. News & World Report, Inc.*, 865 F.2d 364, 374 (D.C. Cir.) (citing *Bruch* in dicta but holding that the arbitrary and capricious standard applies where stock bonus shares are valued on a minority basis for corporate employer's repurchase of stock, pursuant to an agreement that departing employees sell their stock back to the company), *cert. denied*, 109 S. Ct. 3162 (1989).

87. These attacks have become more frequent since 1983. Attorneys for employee/beneficiaries did not mount earlier attacks because they may not have been sufficiently well-versed with ERISA to realize that some rule other than the arbitrary and capricious rule might apply. See, e.g., *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149 (6th Cir. 1985) (noting that the parties agreed that the rule applied to a non-union-negotiated plan); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (noting that the parties agreed that the rule applied to a non-union-negotiated plan); see also *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1297 n.2 (5th Cir. 1985) (neither party initially realized ERISA applied).

88. See, e.g., Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 172 (1930) ("But if it is clear that a certain fact, however material it may have been, was not considered by the court, then the case is not a precedent in future cases in which a similar fact appears."). Professor Levi has commented:

Where case law is considered . . . [the judge in the present case] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. . . . In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference.

E. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-3 (1949) (footnote omitted).

A. Treatment as a Contract

In the earliest attack to reach the circuit courts, the employee/beneficiary contended that standard contract interpretation rules should apply to the plan administrator's interpretation of a union-negotiated plan provision delaying the commencement of his pension benefits.⁸⁹ The employee desired a contract construction rule that would construe the plan's ambiguous terms against the draftsman.⁹⁰ The union was the draftsman, and also appointed some of the plan administrators, thus the employee/beneficiary would benefit from construction under this rule.⁹¹ The circuit court rejected this argument because LMRA precedent requires the arbitrary and capricious rule for review of a plan administrator's discretionary decision.⁹²

B. Conflicts with Third Parties

Another employee/beneficiary argued that the arbitrary and capricious rule does not apply when the discretionary decision involves a conflict between the employee/beneficiaries as a class against non-beneficiaries.⁹³ The Third Circuit, the most responsive court to employees' dissatisfaction with the arbitrary and capricious rule, agreed and refused to apply the rule to a

89. *Harm*, 701 F.2d at 1304 (refusing to adopt the contract interpretation rule).

90. *Id.* Pre-ERISA state courts initially applied this rule of contract construction when they viewed the retirement plan as a contractual arrangement not involving plan administrator discretion. *See, e.g., Sigman v. Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 6, 11 N.E.2d 878, 880 (1937) (holding that courts are to construe booklets in which an employer explains and promotes a pension system most strongly against the employer); *Forrish v. Kennedy*, 377 Pa. 370, 376, 105 A.2d 67, 70 (1954) (suggesting that the court must resort to the trust instrument to determine and define the limits of the trustee's powers). Courts later extended the rule to cases involving plan administrator discretion. *See, e.g., Evo v. Jomec, Inc.*, 119 N.J. Super. 7, 11, 289 A.2d 551, 554 (Super. Ct. Law Div. 1972) (submitting that employee's rights under a profit-sharing plan are governed by principles of contract law). Ironically, ERISA, intended to benefit employee/beneficiaries, 29 U.S.C. § 1001 (1982), had preempted all state laws, including this pro-employee/beneficiary rule. 29 U.S.C. § 1144 (1982).

91. Under the pre-ERISA state law, employers sometimes avoided the deleterious effects of this contract interpretation rule by specifically providing discretion in the plan to the plan administrator concerning such matters as benefit claims and plan interpretation. *See, e.g., Menke v. Thompson*, 140 F.2d 786, 790-91 (8th Cir. 1944) (diversity action) (refusing to interpret a pension plan as an insurance contract because of a plan provision stating that decisions of the plan's board are conclusive); *contra Levitt v. Billy Penn Corp.*, 219 Pa. Super. 499, 283 A.2d 873, 875-76 (Super. Ct. 1971) (suggesting that even where words such as "absolute discretion" are used in a pension plan, such terms do not give the plan administrator absolute discretion in regard to payment of benefits to employees).

92. *Harm*, 701 F.2d at 1304 (citing *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981) (relying on the "well-established" rule that the courts will sustain decisions of those empowered with the administration of an employee pension trust unless arbitrary and capricious or contrary to law)).

93. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 332-33 (3d Cir. 1984).

decision by the employer/trustee of a union-negotiated welfare plan.⁹⁴ The employer/trustee decided (and obtained the approval of the impartial arbitrator as provided under the LMRA) to use the surplus in a medical plan, which arose from an excess of premiums over payments to beneficiaries, to reduce future employer contributions rather than increase the employees' medical benefits.⁹⁵ Because the plan administrator's discretionary decision favored the employers, the court applied the statutory standard of ERISA, the prudent man rule, and remanded the case to obtain facts necessary to that review.⁹⁶

C. Unfunded Plans

The next assault on the application of the arbitrary and capricious rule dealt with an unfunded severance pay policy, in essence a welfare plan. The employee/beneficiary pointed out that the arbitrary and capricious rule originates in trust law;⁹⁷ because an unfunded welfare plan lacks a trust, the rule should not apply.⁹⁸ The court, however, refused to recognize this distinction, fearing exceptions to the rule would cause confusion.⁹⁹

D. Financially Interested Plan Administrators

Last came a charge premised on the idea that courts designed the arbitrary and capricious rule for financially disinterested plan administrators.¹⁰⁰

94. *Id.* (using a standard of "act[ing] with the requisite prudence and with complete and undivided loyalty to the beneficiaries); *accord* *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 138 n.5 (3d Cir. 1987), *aff'd in part and rev'd in part*, 109 S. Ct. 948 (1989).

95. *Struble*, 732 F.2d at 329.

96. *Id.* Several circuits have refused to adopt this limitation on the arbitrary and capricious rule. *See, e.g.,* *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1148 (4th Cir. 1985) (opining that there is no reason to deviate from the Fourth Circuit's arbitrary and capricious rule if the employer decides to deny severance pay because the buying corporation offers all employees similar employment), *cert. denied*, 477 U.S. 903, *aff'd sub nom.* *Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986); *Jung v. FMC Corp.*, 755 F.2d 708, 711 (9th Cir. 1985). This limitation is remarkable because the court applies the statutorily mandated standard for some discretionary decisions and applies a different standard for the remaining discretionary decisions. The statute makes no such distinction, and, therefore, one may have thought that the same principle applied in both situations.

97. *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958) (suggesting that the court's review is limited to insuring proper administration of the fund by the trustees).

98. *Holland*, 772 F.2d at 1147.

99. *Id.* Because ERISA involves numerous complex rules, especially in the tax area, it is amazing that a court would concern itself with a relatively minor exception to one of ERISA's less complex rules.

100. Courts developed the rule for the LMRA cases. *See, e.g., Ruth*, 166 F. Supp. at 347. The LMRA requires that the plan administrator consist of equal numbers of employer and union representatives with an impartial umpire to decide deadlocked matters. 29 U.S.C.

The Ninth Circuit adopted the "less deference" test when presented with the situation of a company-appointed plan administrator who denied severance pay to those employees hired by the subsequent employer. This less deference test means that the trial court should be appreciably more critical of the reasons advanced by the plan administrator for the decision and less willing to resolve ambiguities in the plan administrator's favor.¹⁰¹ The Seventh Circuit, however, refused to abandon the arbitrary and capricious rule when an employee/beneficiary of a company retirement plan, who was denied disability benefits, contended that the company-appointed plan administrator could not function as a disinterested plan administrator.¹⁰²

The Sixth Circuit also adhered to the arbitrary and capricious rule when an employee/beneficiary of a company retirement plan, denied acceleration of retirement benefits at a time when other similarly situated employees had their benefits accelerated, argued that the company-appointed plan administrator had an inherent conflict of interest.¹⁰³ When the Seventh Circuit confronted this same problem it retained the arbitrary and capricious rule, but

§ 186(c)(5) (1982). Hence, the plan administrator should be neutral or, at least, balanced with some members sympathetic to the employee/beneficiary. The Eighth Circuit refused to make the distinction between union-negotiated plans and other plans. *In re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982) (noting that the Eighth Circuit uniformly reviews trustee's decisions under the arbitrary and capricious standard or the abuse of discretion standard).

101. *Jung v. FMC Corp.*, 755 F.2d 708, 711-712 (9th Cir. 1985) (suggesting that where an employer avoids a substantial outlay, "[l]ess deference should be given to the trustee's decision"); see also *supra* note 84 and accompanying text; accord *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1153 (9th Cir. 1986) (holding that the plan administrator of a company who denied early retirement to a striking employee was financially interested since he was a high management official of the employer). *Contra Holland*, 772 F.2d at 1149 ("We see no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard."); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir.) (finding that "there is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review"), *cert. denied*, 474 U.S. 995 (1985).

102. *Brown v. Retirement Comm. of Briggs & Stratton*, 797 F.2d 521, 526 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987). The plan administrator was financially interested because each committee member, as a company employee, *id.* at 535, depended on the employer/contributor for continuing employment. The decision to deny disability benefits clearly reduced the payout (benefits and expenses) from the defined benefit plan and hence reduced the employer's future contributions. The employee/beneficiary correctly depicted this plan administrator as having an adversarial role similar to that of an insurance claims adjuster. *Id.* at 526. The court, however, failed to comprehend the situation, relying on statutory descriptions of a plan administrator's role in an ideal world.

103. *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (remanded for factual findings resulting from the trial court's failure to investigate the reasonableness of the plan administrator's action). The court admitted that if it were considering the standard of review in the absence of prior decisions employing the arbitrary and capricious rule, it would be inclined to use a stricter standard of review for a company-appointed plan administrator consisting of executives rather than the supposedly neutral LMRA plan administrator. *Id.* at 813.

highlighted the flexibility and elasticity of the rule, thus providing a sliding scale of judicial review.¹⁰⁴ The Third Circuit, when considering a severance pay policy under which a company-appointed plan administrator denied benefits, abandoned the arbitrary and capricious rule for financially interested plan administrators and developed an "arm's length" interpretation standard and de novo review.¹⁰⁵ The Supreme Court affirmed this decision on the ground that the plan did not give discretionary authority to the plan administrator and hence the arbitrary and capricious rule did not apply.¹⁰⁶

104. *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1988); *accord Pierre v. Connecticut Gen. Life Ins. Co.*, 866 F.2d 141, 143 (5th Cir. 1989); *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988); *Shull v. State Mach. Co., Employees Profit Sharing Plan*, 836 F.2d 306, 307-08 (7th Cir. 1987); *Maggard v. O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982). The flexibility works as follows:

The fundamental difference in the depth or penetration or exactingness of judicial review is between deferential and nondeferential review, that is, between reversing a tribunal's decision because it is unreasonable and reversing it merely because it is wrong. Sometimes even this difference blurs. When the members of the tribunal—for example, the trustees of a pension plan—have a serious conflict of interest, the proper deference to give their decisions may be slight, even zero; the decision if wrong may be unreasonable.

Van Boxel, 836 F.2d at 1052.

105. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 145 (3d Cir. 1987), *aff'd in part and rev'd in part*, 109 S. Ct. 948 (1989); *accord Haeffele v. Hercules Inc.*, 839 F.2d 952, 957 (3d Cir. 1988) (de novo review permitted). See *supra* note 81 for decisions refusing to adopt this rule.

106. *Firestone*, 109 S. Ct. at 956. Acknowledging that *Firestone* changed the law retroactively, see, e.g., *Orozco v. United Air Lines, Inc.*, 887 F.2d 949 (9th Cir. 1989), the circuit courts are presently groping for the correct standard of review for discretionary plan administrator decisions. See *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989) (*Firestone* has mandated total abandonment of the arbitrary and capricious standard); *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 121-22 (6th Cir. 1989) (*Firestone* rejected the arbitrary and capricious standard). None have engaged in any analysis either from the principles established by the Supreme Court or from policy considerations to determine that standard. The Fourth and Fifth Circuits have announced the new standard as the abuse of discretion rule, amazingly citing *Firestone* (whose holding is limited to the nondiscretionary case) for the proposition without any recognition that this standard is part of the trust law and without any explanation of what this new rule entails. Consequently, these circuits proceed to use the arbitrary and capricious rule. See, e.g., *de Nobel*, 885 F.2d at 1186 (used deferential abuse of discretion test of *Van Boxel*, an arbitrary and capricious case); *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (an arbitrary and capricious act is clearly an abuse of discretion); *Batchelor v. International Bhd. of Elec. Workers*, 877 F.2d 441 (5th Cir. 1989) (plan administrator decision must be reviewed for an abuse of discretion pursuant to *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522 (5th Cir. 1989)); *Lowry*, 871 F.2d at 525 (an abuse of discretion may be the same as arbitrary and capricious).

The Third, Fifth, and Seventh Circuits have extracted another principle from *Firestone*. De novo review applies only to those cases involving an absence of discretion. Therefore, once the court has determined that the employee benefit plan grants discretion to the plan administrator concerning the decision, de novo review cannot be applied and the court will continue to use the arbitrary and capricious standard. See, e.g., *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101 (3d

IV. THE ORIGIN OF THE ARBITRARY AND CAPRICIOUS RULE

In accordance with ideas propounded by Justice Holmes,¹⁰⁷ before courts can determine the proper standard of review for plan administrators' discretionary decisions, they must examine the origin of the arbitrary and capricious rule. Most courts have yet to make this investigation. Consequently, they lack the perspective from which the rule is derived, and as a result possess no idea of its function, purpose, and limitations. The confusion in the various circuits concerning the rule's formulation and variations reflects this lack of knowledge.¹⁰⁸ In such an environment, courts possess a duty to

Cir. 1989); *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047 (7th Cir. 1989); *Lowry*, 871 F.2d at 525.

The Sixth, Eighth, and Eleventh Circuits have devised a third principle from *Firestone*. In the presence of discretion, the court must use the arbitrary and capricious standard. *See, e.g., Baker v. Big Star Div. of the Grand Union Co.*, 888 F.2d 1557 (11th Cir., 1989); *Davis By and Through Farmers Bank and Capital Trust Co. v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989); *Guy v. Southeastern Iron Workers Welfare Fund*, 877 F.2d 37, 38-39 (11th Cir. 1989); *Lahey v. Remington Arms Co., Inc.*, 874 F.2d 541, 544 (8th Cir. 1989). Other courts avoided the issue. *See, e.g., McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426 (6th Cir. 1989) (parties agreed that the review should have been de novo); *Parsons v. West Virginia Works Hourly Employees Pension Plan*, 879 F.2d 130 (4th Cir. 1989) (parties conceded de novo review); *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496, 498 n.3 (8th Cir. 1989) (action falls under de novo rather than arbitrary and capricious rule); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486 (1st Cir. 1989) (plan administrator conceded de novo review was the rule and the court did not reverse because the trial court used a more stringent test than arbitrary and capricious); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) (employee/beneficiary failed to allege an arbitrary and capricious act). In the absence of discretion, the courts use de novo review. *Baker*, 888 F.2d at 1557; *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346 (4th Cir. 1989); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115 (7th Cir. 1989); *Orozco*, 887 F.2d at 951; *Moon v. American Home Assur. Co.*, 888 F.2d 86 (11th Cir. 1989); *Baxter By and Through Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *Aubrey*, 886 F.2d at 122; *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327 (8th Cir. 1989); *International Bhd. of Elec. Workers, Local 47 v. Southern Cal. Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989); *Dzingsliski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989).

107. O. HOLMES, *THE COMMON LAW* (1881). "In order to know what [the law] is, we must know what it has been, and what it tends to become." *Id.* at 1. "The history of what the law has been is necessary to the knowledge of what the law is." *Id.* at 37.

108. *See supra* notes 62-78 and accompanying text. The situation typifies another statement of Justice Holmes:

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things

O. HOLMES, *supra* note 107, at 5.

reexamine that policy, to determine whether that policy still applies to present situations, and, if not, to devise the proper rule.¹⁰⁹

A. State Common Law

Early on, employee benefit plans granted plan administrators discretion in interpreting plan provisions and determining payment of benefits. The earliest courts reviewing a plan administrator's exercise of discretion in these two areas struggled to determine what arrangement existed among the employer, employee/beneficiary, and plan administrator and, hence, what legal principles applied by analogy to the situation.¹¹⁰ The earliest case in this area treated a profit-sharing plan comprised solely of employer contributions as an inchoate gift from the employer to the employee,¹¹¹ and indicated that a court might supervise the plan administrator if "the defendant's trustees were squandering the fund, or were guilty of bad faith in its management."¹¹² Next, several courts faced voluntary relief associations: disability benefit plans comprised solely of employee contributions controlled by employer-appointed trustees, the forerunner of present day pension plans.¹¹³ These courts either applied the rule applicable to fraternal orders and mutual benefit societies, reversing the plan administrator's discretionary action

109. Cf. O. HOLMES, *supra* note 107, at 37.

When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.

Id.

110. See generally Ziskind, *The Law of Employee Benefit Plans*, 1955 WASH. U.L.Q. 112 (primarily contract or trust).

111. *McNevin v. Solvay Process Co.*, 32 A.D. 610, 53 N.Y.S. 98 (App. Div. 1898), *aff'd*, 167 N.Y. 530, 60 N.E. 1115 (1901). The court upheld a denial of benefits to a discharged employee for a plan under the absolute control of the trustee/administrators. The dissent thought the arrangement constituted a contract supported by valuable consideration that the trustee/administrators could not rescind. *Id.* at 617, 53 N.Y.S. at 103.

112. *Id.* at 613, 53 N.Y.S. at 100. This early idea of using bad faith to reverse the plan administrator's discretionary decision was not an issue before the court. However, some state courts adopted the approach of listing bad faith as a ground for reversal when depicting a pension plan as a gratuity. See *Menke v. Thompson*, 140 F.2d 786, 791 (8th Cir. 1944) (fraud or arbitrary action); *Amicone v. Kennecott Copper Corp.*, 19 Utah 2d 297, 300, 431 P.2d 130, 132 (1967) (bad faith, fraud, mistake, or arbitrariness). But see *Umshler v. Umshler*, 332 Ill. App. 494, 499, 76 N.E.2d 231, 233 (1947) (rejecting the bad faith exception to no judicial review for inchoate gifts). Others have used the finding of bad faith to override discretion without acknowledging the source of the rule. See *In re Missouri Pac. R. Co.*, 49 F. Supp. 405, 406 (E.D. Mo. 1943) (diversity action) (unreasonable, arbitrary, unfair or capricious).

113. See *Norman v. Southern Bell Tel. & Tel. Co.*, 322 S.W.2d 95 (Ky. 1959).

only if it was "fraudulent or oppressive,"¹¹⁴ or applied the rule applicable to arbitration awards, overturning the arbitration award only if "fraud or mistake" caused it.¹¹⁵ These early state cases are obviously the source of the bad faith and fraud additions to the arbitrary and capricious rule.¹¹⁶

The seminal state case, *Clark v. New England Telephone & Telegraph Co.*,¹¹⁷ addressed a welfare plan that paid benefits to dependents of employees killed on the job. The court analogized the plan, comprised solely of employer contributions and administered by an employer-appointed plan administrator, to a construction contract or a sales contract in which one party would provide the building or goods to the satisfaction of the other party.¹¹⁸ Hence, the court concluded that it would overturn the plan administrator's decision only after finding evidence of "want of good faith."¹¹⁹ Many subsequent state courts adopted this contractual approach and viewed *Clark* as controlling the situation.¹²⁰ Since then, few employee/beneficiaries have

114. See, e.g., *Nelson v. Atlantic Coast Line R. Co.*, 157 N.C. 156, 167, 72 S.E. 998, 1003 (1911). See also *Cimprich v. Pennsylvania R.R. Co.*, 119 Pa. Super. 5, 9, 180 A. 51, 56 (Super. Ct. 1935) (plan administrator's decisions cannot be attacked collaterally absent fraud or irregularity). The court determined that the policy behind the rule was that court review, if allowed, would foment frequent litigation by each dissatisfied employee/beneficiary and cause trustees to waste (deliver to attorneys) funds raised for wise and beneficial purposes. *Id.* at 15, 180 A. at 55. This policy, grounded in mutual benefit society law, does not apply to modern welfare plans because employers would bear the cost in future contributions (or reduced benefits) and Congress designed ERISA's two-tiered claim procedure to reduce litigation. See 120 CONG. REC. S29,941 (daily ed. Aug. 22, 1974) (statement of Sen. Javits) (explaining the rejection of a prior claims proposal in favor of the two-tiered system "on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes").

115. *Pennsylvania Co. v. Reager's Adm'x*, 152 Ky. 824, 837, 154 S.W. 412, 417 (1913). The court upheld a railroad relief department decision to terminate a disability benefit because the beneficiary could earn a living. *Id.* at 835, 154 S.W. at 417. The court treated the arrangement as a contract with an arbitration provision appointing the plan administrator as the arbitrator. *Id.* The policy behind the rule was to foster out-of-court settlements by impartial tribunals (the employee/beneficiary participated in electing some members of the plan administrator). This policy, however, does not apply to the typical situation of the company plan where the company selects the plan administrator.

116. See *supra* notes 64-66 and accompanying text.

117. 229 Mass. 1, 118 N.E. 348 (1917). In *Clark*, the court upheld the plan administrator's discretionary decision not to pay benefits to a deceased employee's father because the father had signed a statement claiming he was not dependent on his son. *Id.* at 9, 118 N.E. at 350.

118. *Id.* at 3-4, 118 N.E. at 349.

119. *Id.* at 9, 118 N.E. at 350.

120. See, e.g., *Western Union Tel. Co. v. Robertson*, 146 Ark. 406, 414-15, 225 S.W. 649, 652-53 (1920) (no evidence of bad faith); *Norman v. Southern Bell Tel. & Tel. Co.*, 322 S.W.2d 95, 99 (Ky. 1959) (bad faith); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 424, 208 N.E.2d 858, 863 (1965) (fair and reasonable but uses bad faith); *Moore v. Postal Tel.-Cable Co.*, 202 S.C. 225, 232, 24 S.E.2d 361, 363 (1943) (fraud or bad faith but uses unreasonable test); *Long v. Southwestern Bell Tel. Co.*, 442 S.W.2d 462, 466-67 (Tex. Civ. App.-San Antonio 1969, writ n.r.e.) (fraud and bad faith); *Dowling v. Texas & New Orleans R.R.*, 80 S.W.2d 456, 458 (Tex. Civ. App.-Galveston 1935, no writ) (not subject to attack in the courts except upon a showing

succeeded in proving that the plan administrator made his decision in bad faith,¹²¹ perhaps because the employee/beneficiary must prove bad faith by "overwhelming" evidence.¹²²

Another approach adopted by some state courts considered the arrangement as a trust and applied trust law,¹²³ a procedure later followed in the LMRA cases.¹²⁴ The portion of trust law used by the courts permitted overturning the plan administrator's decision if the court deemed the decision "unreasonable."¹²⁵

of fraud or bad faith); *Magnolia Petroleum Co. v. Butler*, 86 S.W.2d 258 (Tex. Civ. App.-Fort Worth 1935, no writ) (good faith). Some state courts followed *Clark* even when viewing the situation as a gratuity. See *Spiner v. Western Union Tel. Co.*, 73 S.W.2d 566, 568 (Tex. Civ. App.-Beaumont 1934, no writ) (not subject to attack in the court absent actual fraud or bad faith).

Some state courts following a trust theory have also viewed *Clark* as dispositive. See *Schwartz v. Century Circuit, Inc.*, 39 Del. Ch. 340, 346, 163 A.2d 793, 796 (1960) (fraud, bad faith, or the like).

Other state courts have used the lack of good faith rule without an indication of its source. See *Paddock Pool Constr. Co. v. Monseur*, 23 Ariz. App. 451, 453, 533 P.2d 1188, 1190 (1975); *Bos v. United States Rubber Co.*, 100 Cal. App. 2d 565, 570 224 P.2d 386, 398 (1950).

121. In *Schwartz*, 39 Del. Ch. at 348-49, 163 A.2d at 798, a Delaware state court adopted the contractual approach and found bad faith in the forfeiture of profit-sharing credits under a provision for forfeiture due to dishonesty or gross misconduct. The committee members were company employees and the defendants in a lawsuit filed by the employee/beneficiary and had an antagonistic attitude toward the employee/beneficiary. Hence, bad faith relates to motive and conflicts of interest.

Other employee/beneficiaries prevailed under state law, but an examination of the cases indicates that a reasonableness test (from trust law), and not bad faith, provided the reasoning even though the courts used a contractual approach. See *Moore*, 202 S.C. at 227, 24 S.E.2d at 363; *Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441 (1934).

122. *Lano v. Rochester Germicide Co.*, 261 Minn. 556, 563, 113 N.W.2d 460, 465 (1962); *Menke v. Thompson*, 140 F.2d 786, 791 (8th Cir. 1944) (analogizing the situation to architect arbitration provisions in construction contracts).

123. *Forrish v. Kennedy*, 377 Pa. 370, 376-77, 105 A.2d 67, 70 (1954) ("[W]hile a court cannot control the discretion conferred upon a trustee, it may compel him to exercise it in good faith and within the bounds of a reasonable judgment" (quoting *In re Brown's Appeal*, 345 Pa. 373, 379, 229 A.2d 52, 55 (1942))); *Leigh v. Estate of Leigh*, 55 Misc. 2d 294, 297, 284 N.Y.S.2d 991, 994-95 (Sup. Ct. 1967) (arbitrary or bad faith); accord *Bird v. Connecticut Power Co.*, 144 Conn. 456, 133 A.2d 894 (1957) (whim).

Some courts following a contractual theory have used the trust rule. See *Wilson*, 48 Ohio App. at 450, 194 N.E. at 441 (whim or caprice).

124. See, e.g., *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958). See also *infra* notes 133-52 and accompanying text.

125. See, e.g., *Forrish*, 377 Pa. at 376-77, 105 A.2d at 70; *Reese v. Administrative Comm. of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 649, 32 Cal. Rptr. 818, 820 (1963); *Van Pelt*, 60 Ill. App. 2d at 424, 208 N.E.2d at 864. *Forrish* was cited in *Brown's Appeal*, 345 Pa. at 379, 29 A.2d at 55, for this proposition, which in turn cited the Restatement of Trusts. RESTATEMENT (SECOND) OF TRUSTS § 187 comment h (court will intervene if the trustee acts arbitrarily or by whim).

The contractual construction rule provided the other pillar of state law review of plan administrator discretionary actions. Even when the plan administrator had discretion,¹²⁶ those courts that viewed the plan as a contract construed the plan's ambiguous terms against the employer and in favor of the employee.¹²⁷ In contrast, those courts that treated the plan as a trust tended to construe the trust indenture strictly in favor of the draftsman/settlor by determining his intent and against the employee/beneficiary.¹²⁸

Although this state law, with its bad faith and construction against the draftsman rules, may be regarded as part of the common law of employee benefit plans that a federal court could use in formulating the federal common law of employee benefit plans,¹²⁹ ERISA specifically preempted all state laws that related to retirement and welfare plans.¹³⁰ Although no subsequent court has directly applied state law to an ERISA plan,¹³¹ the state contract cases appear to have sown the seed of the bad faith addition to the ERISA arbitrary and capricious rule.

126. See, e.g., *Rochester Corp. v. W.L. Rochester*, 450 F.2d 118 (4th Cir. 1971); *Smith v. Union Carbide Corp.*, 231 F. Supp. 980 (E.D. Tenn. 1964), *rev'd on other grounds*, 350 F.2d 258 (6th Cir. 1965); *Frietzsch v. First W. Bank & Trust Co.*, 168 Cal. App. 2d 705, 336 P.2d 589 (1959); *Evo v. Jomac, Inc.*, 119 N.J. Super. 7, 289 A.2d 551 (Super. Ct. Law Div. 1972); *Levitt v. Billy Penn Corp.*, 219 Pa. Super. 499, 283 A.2d 873 (1971); *Thornbery v. MGS Co., Inc.*, 46 Wis. 2d 592, 176 N.W.2d 355 (1970); *accord Brinzo v. Phoenix Steel Corp.*, 304 A.2d 66 (Del. Ch. 1973) (where agreement is ambiguous reviewing court may not rewrite the agreement).

Even those courts viewing the situation as a trust sometimes used the construction rule. See, e.g., *Forrish*, 377 Pa. at 376, 105 A.2d at 70 (partial discretion). However, those courts viewing the situation as a gratuity refused to use the construction rule. See, e.g., *Menke*, 140 F.2d at 786 (contract not interpreted strictly against the employer because burden employee assumed was entirely voluntary and gratuitous).

127. *Sigman v. Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N.E.2d 878 (1937); see also *supra* notes 89-92 and accompanying text.

128. See H.R. REP. NO. 533, *supra* note 30, at 5 ("Courts strictly interpret the plan indenture"), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 4643.

129. See *supra* note 34 and accompanying text.

130. 29 U.S.C. § 1144(a) (1982). Congress reasoned that preemption would eliminate the threat of conflicting and inconsistent state and local regulations, see 120 CONG. REC. S29,933 (daily ed. Aug. 22, 1974) (statement by Sen. Williams), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5188, and the threat of one state court using a contractual approach of interpretation and another using a trust approach.

131. One circuit court's ERISA opinion added a state case to its string citations for the "bad faith" proposition. *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir.) (citing *Wyper v. Providence Wash. Ins. Co.*, 533 F.2d 57, 62 (2d Cir. 1976) (applying state law citations that trace back to *Clark v. New England Tel. & Tel. Co.*, 229 Mass. 1, 118 N.E. 348 (1918))), *cert. denied*, 464 U.S. 829 (1983). The Fifth Circuit has specifically rejected the state construction rule. *Bayles v. Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97 (5th Cir. 1979).

B. Common Law Under the LMRA

The only standard for plan administrator behavior contained in the LMRA was the loyalty standard derived from trust law. According to this standard, plan administrators must operate the plan for the "sole and exclusive benefit" of the employee/beneficiaries.¹³² Hence, after the LMRA's passage, the behavior standard for plan administrators, at least for union-negotiated plans, rested upon this trust law standard. The question of court review of the plan administrator's discretionary decisions under this standard, not contained in the statute, first arose in four district court cases involving the United Mine Workers of America Welfare and Retirement Fund.

In *Hobbs v. Lewis*,¹³³ the plan administrators denied a nearly illiterate worker a pension without informing him of the reason for the denial. The administrator based the denial on discrepancies between his certified union statement and the Social Security Agency records in his twenty-year service record. The plan administrators contended that the plan was a charitable trust requiring review of their discretionary act under trust law fiduciary standards.¹³⁴ Consequently, the plan administrators argued that the court could not interfere unless the plan administrators had acted arbitrarily or unreasonably.¹³⁵ The court determined that the trust was noncharitable and that the arbitrary and capricious rule applied. However, even using that rule, the court found that refusing to accept the union certified statement, as provided for in the plan's regulations, and not making an investigation concerning the discrepancy, amounted to arbitrary and unreasonable acts.¹³⁶

In *Ruth v. Lewis*,¹³⁷ the plan administrators denied a pension to an eighty-seven-year-old illiterate. The court, after hearing testimony of the employee's daughter and numerous other witnesses, and after reviewing company records, which did not agree with the employee/beneficiary's application, developed the absence of the de novo review requirement of the

132. This standard is the same standard that a trustee must satisfy under trust law. Compare 29 U.S.C. § 186(c)(5) (1982) with RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959) (on the duty of loyalty).

133. 159 F. Supp. 282 (D.D.C. 1958).

134. *Id.* at 286. The review standards for a fiduciary's discretionary decision for both a charitable trust and a noncharitable trust are the same. Compare RESTATEMENT (SECOND) OF TRUSTS § 382 (1959) with § 187. The distinction retains importance only in that state attorneys general also enforce charitable trusts. See, e.g., 4A W. FRATCHER, SCOTT ON TRUSTS § 391 (1988).

135. *Hobbs*, 159 F. Supp. at 286. See also *infra* note 169 and accompanying text.

136. *Hobbs*, 159 F. Supp. at 287.

137. 166 F. Supp. 346 (D.D.C. 1959).

arbitrary and capricious rule.¹³⁸ The court determined that the plan was a noncharitable trust and that court review of plan administrator action was limited to cases involving breach of fiduciary trust, fraud or arbitrary action (sometimes described as arbitrary or capricious action).¹³⁹ The court recited the following policy reasons: (1) court review should not render the plan administrator's role a nullity, similar to court review of any trust fiduciary; (2) court review should not be lengthy (the hearing of testimony lasted two weeks); and (3) the plan administrators should not incur the legal expense of uncovering the true facts in court.¹⁴⁰ Hence, the court limited its review to the evidence submitted to the plan administrator and remanded the case to the plan administrator to determine eligibility on the basis of the new evidence.¹⁴¹

In *Kenet v. United Mine Workers*,¹⁴² the plan administrators terminated payments to an employee/beneficiary, who had previously received payments, because subsequent investigation indicated that his service did not amount to bona fide service.¹⁴³ The court rejected the trust approach and determined that the relationship formed a contract for which the employee/beneficiary was a third-party beneficiary.¹⁴⁴ The court limited its review to a determination of first, in a non-de novo proceeding, whether substantial evidence supported the plan administrator's decision (not whether the decision was contrary to the weight of evidence), and second, whether the action was arbitrary or capricious. The court dismissed the case because substantial evidence supported the decision.

In *Barlow v. Roche*,¹⁴⁵ the plan administrators refused to reimburse certain medical expenses of an employee because the employee/beneficiary had not filed the proper form prior to incurring the expense, as required by the plan.¹⁴⁶ The court rejected the third-party beneficiary theory, noting that the plan constituted a trust. Consequently, the court applied the trust rule of court review of the plan administrator's action to determine whether sufficient fraud, maliciousness, bad faith, or arbitrariness and cavaliness existed to such a degree as to constitute an abuse of discretion.¹⁴⁷

138. *Id.* at 349.

139. *Id.*

140. *Id.*

141. *Id.*

142. 183 F. Supp. 315 (D.D.C. 1960).

143. *Id.* at 317. (The administrator's determination focused on the one-year-immediately-prior-to-retirement requirement.).

144. *Id.* at 317-18.

145. 161 A.2d 58 (D.C. 1960).

146. *Id.* at 60.

147. *Id.* at 63.

The first case to reach the circuit courts, *Danti v. Lewis*,¹⁴⁸ became the definitive statement of the rule for all other LMRA cases. In *Danti*, the plan administrators convinced the court that the four district court decisions correctly formed the standard of review: "whether the Trustees have acted arbitrarily, capriciously or in bad faith; that is, is the decision of the Trustees supported by substantial evidence or have they made an erroneous decision on a question of law."¹⁴⁹ Thus, the LMRA arbitrary and capricious rule rests upon the trust law first applied by the lower courts,¹⁵⁰ in particular the rule for court review of discretionary action by the trustee.¹⁵¹ Subsequent courts have recognized that the *Danti* court adopted the trust review rule.¹⁵²

C. ERISA Creates Fiduciary Standards

Congress, by passing ERISA, considerably bolstered the language of the LMRA concerning the fiduciary standard of behavior, primarily by modifying the "sole and exclusive benefit" language of the LMRA and adding the ERISA requirement that plan fiduciaries act with the care and skill of a prudent man in like circumstances.¹⁵³ Legislative history indicates that courts should interpret this language as incorporating the trust common law with appropriate adjustments for differences between traditional trusts and employee benefit plans.¹⁵⁴ However, this change in language and accompa-

148. 312 F.2d 345 (D.C. Cir. 1962).

149. *Id.* at 348.

150. *Hobbs v. Lewis*, 159 F. Supp. 282, 286-87 (D.D.C. 1958) (the rule for a charitable trust); *Ruth v. Lewis*, 166 F. Supp. 346, 349 (D.D.C. 1958) (the rule for a noncharitable trust); *Kennet v. United Mine Workers*, 183 F. Supp. 315, 318 (D.D.C. 1960) (the rule of *Hobbs*); *Barlow*, 161 A.2d at 63 (citing SCOTT ON TRUSTS § 187 (2d ed. 1956)).

151. The RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) provides: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."

152. See, e.g., *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1256 (9th Cir. 1987) (to some extent the standard of review comes from trust law) (citing progeny of *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962)); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1988) (the standard of review is the traditional standard of review of the law of trusts) (citing *Danti* progeny); *Wardle v. Central States Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980) (same), *cert. denied*, 449 U.S. 112 (1981).

153. 29 U.S.C. § 1104(a) (1982).

154. The House Report provides:

[E]ven where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. . . . [C]ourts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee

nying legislative history instruction went largely unnoticed by the circuit courts.

In each circuit, the initial cases that arose under ERISA also involved LMRA, and, therefore, the courts uniformly used the LMRA rule,¹⁵⁵ de-

benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

.....

The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated

H.R. REP. NO. 533, *supra* note 30, at 12-13, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4650-51. The Conference Report states: "The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. CONF. REP. NO. 1280, *supra* note 6, at 302, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5083.

155. *See* Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 187 (3d Cir. 1984) (citing an LMRA case of the same circuit); Van Gunten v. Central States, S.E. & S.W. Areas Pension Fund, 672 F.2d 586, 587 (6th Cir. 1982) (citing an LMRA case of another circuit); Maggard v. O'Connell, 671 F.2d 568, 570-71 (D.C. Cir. 1982) (citing an LMRA case of the same circuit); Palino v. Casey, 664 F.2d 854, 858 (1st Cir. 1981) (citing an LMRA case of the same circuit); Horn v. Mullins, 650 F.2d 35, 37 (4th Cir. 1981) (citing an LMRA case of the same circuit); Peckham v. Board of Trustees of the Int'l Bhd. of Painters & Allied Trades Union, 653 F.2d 424, 426 (10th Cir. 1981) (citing an ERISA case and an LMRA case from another circuit); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds, 624 F.2d 1132, 1138 (2d Cir. 1980) (citing LMRA cases from other circuits); Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 437 (9th Cir. 1980) (citing an LMRA case of the same circuit); Bayles v. Central States, S.E. & S.W. Areas Pension Fund, 602 F.2d 97, 99-100 (5th Cir. 1979) (citing LMRA cases from other circuits); Reiherzer v. Shannon, 581 F.2d 1266, 1272 (7th Cir. 1978) (citing an LMRA case of another circuit); Bueneman v. Central States, S.E. & S.W. Areas Pension Fund, 572 F.2d 1208, 1209 (8th Cir. 1978) (citing LMRA cases of the same circuit).

Because the Fifth Circuit was divided in 1981 to create the present Fifth and Eleventh Circuits, the Eleventh Circuit has followed the Fifth Circuit.

Several circuits have devised the rule more than once, either from another circuit, *see* Chambliss v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1038 (2d Cir. 1985) (union-negotiated plan), *cert. denied*, 475 U.S. 1012 (1986); Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984); Carter v. Central States, S.E. & S.W. Areas Pension Plan, 656 F.2d 575, 576 (10th Cir. 1981); International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211, 1214 (7th Cir.) (union-negotiated plan), *cert. denied*, 454 U.S. 866 (1981), or from an LMRA case in the same circuit. *See* Holt v. Winpisinger, 811 F.2d 1532, 1535 (D.C. Cir. 1987) (union-negotiated plan); Stewart v. National Shopmen Pension Fund, 795 F.2d 1079, 1083 (D.C. Cir. 1986) (union-negotiated plan); McConnell v. Meba Medical & Benefits Plan, 778 F.2d 521, 523 (9th Cir. 1985) (union-negotiated plan); District 17, Dist. 29, Local Union 7113, & Local Union 6023 v. Allied Corp., 765 F.2d 412, 417 (4th Cir.), *cert. denied*, 473 U.S. 905 (1985); Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 334 (3d Cir. 1984) (union-negotiated plan); Elser v. IAM Nat'l Pension Fund, 684 F.2d 648, 652 (9th Cir. 1982) (union-negotiated plan); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 915 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); Fen-

spite congressional disapproval of the LMRA fiduciary conduct standards.¹⁵⁶ The similar language of the "sole and exclusive benefit" standard may have provided another reason implicitly used by the courts to continue the use of the LMRA arbitrary and capricious rule.¹⁵⁷ The exception to this trend involved one Sixth Circuit case¹⁵⁸ that used the prudent man rule, but no subsequent court has cited the case on this point. The First and Second Circuits noted the prudent man rule for ERISA cases but used the LMRA rule.¹⁵⁹ The Third Circuit, in an LMRA case, prior to its facing an ERISA case, stated that the same arbitrary and capricious rule would have applied had the employee/beneficiary brought the case under ERISA.¹⁶⁰ The Seventh Circuit has refused to follow the prudent man rule and employs the LMRA rule.¹⁶¹

V. THE PROPER RULE

Determining the applicable rule under ERISA for court review of a plan administrator's discretionary action involves a retrospective review of the

tron Indus., Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1307 (9th Cir. 1982) (union-negotiated plan).

156. H.R. REP. NO. 533, *supra* note 30, at 4 ("[The LMRA] is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct."), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4642.

More recently, circuit courts questioned the appropriateness of the LMRA rule's adoption. *See, e.g.,* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987) ("the arbitrary and capricious standard may be inapt, a historical mistake, or a mechanical extrapolation from different settings"); Varhola v. Doe, 820 F.2d 809, 813 (6th Cir. 1987) ("[w]ere we writing on a clean slate, we might well be persuaded that [a] stricter standard of review should apply"); Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1984) ("[w]e do not decide that [the arbitrary and capricious standard] is the only applicable standard of review when ERISA's provisions have been flouted"), *cert. denied*, 474 U.S. 865 (1985).

157. *See* Comment, *supra* note 10, at 993-94. However, Congress stated that the "solely . . . and for the exclusive purpose of providing benefits" language in ERISA (worded slightly differently than in the LMRA's "sole and exclusive benefit") came from section 401 of the Internal Revenue Code. H.R. CONF. REP. NO. 1280, *supra* note 6, at 302, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5083. *See also* Mittleman, *The Exclusive Benefit Rule and Diversification*, 31 BUS. LAW. 111 (1975); *infra* note 214.

158. Pierce v. NECA-IBEW Welfare Trust Fund, 620 F.2d 589, 591 (6th Cir. 1978) (agreeing with the district court opinion), *cert. denied*, 449 U.S. 1015 (1980).

159. *Morse*, 732 F.2d at 1145; *Palino*, 664 F.2d at 857-58.

160. *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 596 n.5 (3d Cir.), *cert. denied*, 454 U.S. 878 (1981). The Ninth Circuit also believes the ERISA rule and the LMRA rule are the same. *Elser v. IAM Nat'l Pension Fund*, 684 F.2d 648, 652 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983).

161. *Allen v. United Mine Workers 1979 Benefit Plan & Trust*, 726 F.2d 352, 353-54 (7th Cir. 1984).

legislative history, prior court interpretations, and specific statutory language.

A. Legislative History Approach

The United States Supreme Court's pronouncements on the legislative history of ERISA recognized that Congress intended to codify and make applicable to ERISA fiduciaries certain principles of trust law.¹⁶² To implement these intentions, the Supreme Court concluded that Congress intended that the courts develop a federal common law of trusts under ERISA,¹⁶³ taking into account the special characteristics of employee benefit plans.¹⁶⁴ The courts must now resolve the remaining issue of what trust law to apply.

1. Trust Law Situations

Trust law provides for the reversal of trustee discretionary actions by court review in four situations: (1) when, if a standard exists by which to judge the trustee's action, the trustee "acts beyond the bounds of reasonable judgment;" (2) when the trustee acts dishonestly; (3) when the trustee acts with an improper, though not dishonest, motive; and (4) when the trustee fails to act.¹⁶⁵ The courts that developed this trust law used a number of phrases to describe these situations or portions thereof. These phrases include "arbitrary," "capricious," "bad faith," "fraud," and "abuse of discretion."¹⁶⁶ Some courts neither clearly distinguished between the situations covered by these various phrases, resulting in some overlap, nor clearly dis-

162. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989); see H.R. REP. NO. 533, *supra* note 30, at 12 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 4649; 120 CONG. REC. S29,932 (daily ed. Aug. 22, 1974) (statement of Sen. Williams) ("The objectives of these [fiduciary] provisions are to make applicable the law of trusts . . ."), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186.

163. See *supra* note 34.

164. See *supra* note 154.

165. RESTATEMENT (SECOND) OF TRUSTS § 187 comments e-i (1959). The courts applied this trust law in the LMRA cases, see, e.g., *Barlow v. Roche*, 161 A.2d 58, 63 n.16 (D.C. 1960) (citing SCOTT ON TRUSTS § 187 (2d ed. 1956), whose sections correspond to the Restatements), and in the ERISA cases. See, e.g., *Firestone*, 109 S. Ct. at 954.

Plan administrators typically recognize only the first situation as the rule mandated by trust law, modify it to permit only de novo review, and reject or ignore the remainder. See Brief for Petitioner at 17, 19, *Firestone* (No. 87-1054). Thus a court must take care when evaluating their advocacy for trust law.

166. Courts sometimes use the phrase "arbitrary, capricious, and in bad faith" in trust law to refer to court review of the exercise of a trustee's discretion. See *Town of Randolph v. Roberts*, 346 Mass. 578, 580, 195 N.E.2d 72, 73 (1964). See also *First Nat'l Bank of Md. v. Department of Health & Mental Hygiene*, 284 Md. 720, 726, 399 A.2d 891, 896 (1979) ("arbitrary, dishonest or from an improper motive").

tinguished which situation a particular phrase covered.¹⁶⁷ An attempt to determine which of these situations corresponds to the ERISA arbitrary and capricious rule, and hence the situations to which a court should limit its application, is not readily apparent solely by comparing phrases.

For example, the ERISA arbitrary and capricious rule generally corresponds to the situation where a standard to judge the trustee's action exists.¹⁶⁸ The Restatement (Second) of Trusts explicitly equates unreasonable with arbitrary,¹⁶⁹ as do the trust¹⁷⁰ and the LMRA cases.¹⁷¹ Capriciousness is generally considered the opposite of reasonableness.¹⁷² Cases applying trust law in this instance sometimes refuse de novo review;¹⁷³ however, the courts lack uniformity and some courts order a dismissal directing the trustee to exercise his reasonable judgment.¹⁷⁴ Some courts remand for the

167. Cf. G. BOGERT & G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 560, at 199-201 (1980) [hereinafter BOGERT].

168. The exact distinction between the words may be of no import because some courts view the phrases as being interchangeable in trust law. See, e.g., *Fielding v. International Harvester*, 815 F.2d 1254, 1256 (9th Cir. 1987) ("preserv[ing] the 'arbitrary and capricious' vocabulary"). See also BOGERT, *supra* note 167, § 560, at 199.

169. Compare RESTATEMENT (SECOND) OF TRUSTS § 128 comment d (1959) with *id.* § 187 comment e.

170. Cases cited by the RESTATEMENT (SECOND) OF TRUSTS § 187 and 3 W. FRATCHER, *supra* note 134, § 187.2, for overruling a trustee's discretionary act for failure to use reasonable judgment and label the decision as arbitrary action include: *Funk v. Commissioner*, 185 F.2d 127 (3d Cir. 1950) (trust); *In re Clark*, 174 Iowa 449, 451, 154 N.W. 759, 760 (1916) (will), *reh'g denied*, 174 Iowa 459, 156 N.W. 353 (1916); *State v. Rubion*, 158 Tex. 43, 52, 308 S.W.2d 4, 9 (1957) (will). Compare *Price v. Price*, 341 Mass. 390, 393, 170 N.E.2d 346, 348 (1960) (will); *In re Shiel's Will*, 120 N.Y.S.2d 632, 636 (Surr. Ct. 1953) (will) with RESTATEMENT (SECOND) OF TRUSTS § 187 comment e (1959).

171. *Hobbs v. Lewis*, 159 F. Supp. 282, 287 (D.D.C. 1958).

172. See *Funk*, 185 F.2d at 131 (trust) (substandard conduct would be unreasonable and a breach of trust where trust did not sanction caprice); *Woodward v. Jolbert*, 94 N.H. 324, 326, 52 A.2d 641, 644 (1947) (citing § 187) ("[p]rudence and reasonableness, not caprice or careless good nature . . . furnish the standard . . ."); see also BOGERT, *supra* note 167, at 195 (no reason at all is arbitrary and capricious); *Corkery v. Dorsey*, 223 Mass. 97, 111 N.E. 795 (1916) (prudence and reasonableness, not caprice or carelessness); *Garvey v. Garvey*, 150 Mass. 185, 22 N.E. 889 (1889) (trustee is to act on "good judgment" and not upon his mere will or caprice or from selfish or corrupt motives).

173. See *In re Heard's Estate*, 107 Cal. App. 2d 225, 232, 236 P.2d 810, 816 (1951) (court will not substitute its judgment); *Woodward v. Jolbert*, 94 N.H. 324, 327, 52 A.2d 641, 644 (1947) (citing RESTATEMENT (SECOND) OF TRUSTS § 187) ("some manner of executing the trust which will comply [with the trust] should be determined upon by [the trustees] and submitted to the court if prudence dictates"); *Shiel's Will*, 120 N.Y.S.2d at 636 ("The court may not substitute its judgment for that of the trustees."); *In re Hafemann's Will*, 265 Wis. 641, 646, 62 N.W.2d 561, 564 (1954) (asserting that when trustees fail to exercise a reasonable judgment, it is the court's duty to direct them to exercise their discretion properly).

174. See, e.g., *Hanford v. Clancy*, 87 N.H. 458, 183 A. 271 (1936); *In re Gruber's Will*, 122 N.Y.S.2d 654 (Surr. Ct. 1953); *Manning v. Sheehan*, 75 Misc. 374, 133 N.Y.S. 1006 (Surr. Ct. 1912); *In re Brown's Appeal*, 345 Pa. 373, 380, 29 A.2d 52, 55 (1942).

trial court to hear evidence and exercise its supervisory powers;¹⁷⁵ whereas other courts remand for the trial court to set boundaries within which the trustee must exercise his discretion.¹⁷⁶ Hence the absence of de novo review and the substantial evidence requirement of the ERISA arbitrary and capricious rule did not derive from trust law but rather from the federal common law of employee benefit plans and the requirement applies when the ERISA arbitrary and capricious rule applies.

Moreover, the bad faith addition to the arbitrary and capricious rule mirrors the dishonest trustee situation. A trustee with discretion engages in dishonesty when his decision benefits himself at the expense of the beneficiary.¹⁷⁷ Thus, when an employer plan administrator of a welfare plan or defined benefit plan denies a benefit, the employer engages in self-dealing by reducing any future contribution and effectively taking money from the trust.¹⁷⁸ Some courts describe such self-dealing as acting in bad faith,¹⁷⁹ as

175. See, e.g., *In re Cool's Trusteeship*, 210 Iowa 30, 33-34, 230 N.W. 353, 355 (1930); *Schofield v. Commerce Trust Co.*, 319 S.W.2d 275, 278 (Kan. Ct. App. 1958); *Gardner v. O'Loughlin*, 76 N.H. 481, 483, 84 A. 935, 936 (1912); *Stallard v. Johnson*, 189 Okla. 376, 379, 116 P.2d 965, 967 (1941); *In re Curtis' Trust Estate*, 253 Wis. 119, 125-26, 33 N.W.2d 193, 197 (1948).

176. See, e.g., *In re Sullivan's Will*, 144 Neb. 36, 12 N.W.2d 148 (1943); *Eaton v. Eaton*, 82 N.H. 216, 132 A. 10 (1926).

177. *Beatson v. Bowers*, 174 Ind. 601, 91 N.E. 922 (1910) (trustee received consideration to make payment to beneficiary); *Keating v. Keating*, 182 Iowa 1056, 165 N.W. 74 (1917) (trustee refused to convey land to beneficiary and wrote letter stating he might give it to his daughter); *Butler v. Badger*, 128 Minn. 99, 150 N.W. 233 (1914) (trustee accused of receiving a benefit for becoming a trustee); *Oskner v. Jaco*, 646 S.W.2d 385, 387 (Mo. Ct. App. 1983) (alleged trustee-beneficiary refused to pay funeral expenses so his remainder would be greater); *Gould v. Starr*, 558 S.W.2d 755, 766 (Mo. Ct. App. 1977) (trustee received exorbitant selling commissions and legal fees), *cert. denied*, 436 U.S. 905 (1978); *Turnure v. Turnure*, 89 N.J. Eq. 197, 201-02, 104 A. 293, 295 (1918) (no evidence that refusal to convey land to beneficiary was for a selfish motive); *Metcalf v. Gladding*, 35 R.I. 395, 87 A. 195 (1913) (upheld advances made to certain beneficiaries because the "trustee" received no benefit); *In re Teasdale's Estate*, 261 Wis. 248, 253-54, 52 N.W.2d 366, 372 (1952) (trustees made evaluation to benefit one of the trustees); *In re Smith*, [1896] 1 Ch. 71 (trustee bribed to make trust investment). See also RESTATEMENT (SECOND) OF TRUSTS § 187 (1959); 3 W. FRATCHER, *supra* note 134, § 187.4 (stating the proposition that a court may reverse a trustee's discretionary act for dishonesty). The Restatement only gives bribery as an example of dishonesty. RESTATEMENT (SECOND) OF TRUSTS § 187 comment f (1959).

178. Some plan administrators try to disguise self-dealing under the conflict of interest rubric. See Brief for Petitioners at 28, *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989) (No. 87-1054); Brief for Chamber of Commerce of the United States and the National Association of Manufacturers as Amici Curiae at 17, *Firestone* (No. 87-1054) [hereinafter Amici Brief for Chamber of Commerce]; Brief for the ERISA Industry Committee as Amicus Curiae at 11, *Firestone* (No. 87-1054) [hereinafter Amicus Brief for ERISA Industry]. See also *Firestone*, 109 S. Ct. at 956 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 comment d (1959) (conflict of interest is only a factor in determining self-interest)).

in the ERISA cases.¹⁸⁰ Hence the bad faith component that some of the circuits add to the ERISA arbitrary and capricious rule rests upon a portion of the trust law that allows the reversal of a trustee's discretionary decisions. Under trust law, a court, once it finds that the trustee acted dishonestly (or in bad faith), uses a de novo review of the discretionary decision and, if the court finds the decision incorrect, substitutes its own judgment for the decision that the court believes the trustee should have made.¹⁸¹

The third situation, involving trustee action having an improper, but not dishonest, motive does not correspond to any recognized addition to the arbitrary and capricious rule. A trustee with discretion acts with an improper motive when furthering an interest other than that of the trust,¹⁸² acts out of spite,¹⁸³ prejudice,¹⁸⁴ or self-interest (other than self-dealing).¹⁸⁵ Acting

179. *Gould v. Starr*, 558 S.W.2d 755, 765 (Mo. Ct. App. 1977), *cert. denied*, 436 U.S. 905 (1978); *Turnure*, 89 N.J. Eq. at 202, 104 A. at 295; *Teasdale*, 261 Wis. at 262, 52 N.W.2d at 372.

180. *See, e.g., Allen v. United Mine Workers 1979 Benefit Plan*, 726 F.2d 352, 354 (7th Cir. 1984).

181. *See, e.g., Elward v. Elward*, 117 Kan. 458, 232 P. 240 (1924) (trustee-beneficiary refused to increase allowance of his sister beneficiary); *Collister v. Fassitt*, 163 N.Y. 281, 57 N.E. 490 (1900) (trustee-beneficiary refused to maintain beneficiary [husband's niece]); *Matter of Allen*, 192 Misc. 8, 82 N.Y.S.2d 828 (Surr. Ct. 1948) (trustee-beneficiary refused to maintain beneficiary [stepmother]). *See also* 3 W. FRATCHER, *supra* note 134, § 187.1 (discussing methods by which a court may control a trustee who commits or threatens to commit a breach of trust).

182. *See, e.g., Horne v. Title Ins. & Trust Co.*, 79 F. Supp. 91 (S.D. Cal. 1948) (trustee gave trust property to his second wife, not a beneficiary as was his first wife); *Conway v. Emeny*, 139 Conn. 612, 96 A.2d 221 (1953) (trustees terminated trust for a museum to benefit contingent beneficiary, a school); *In re Roth's Will*, 154 Misc. 5, 276 N.Y.S. 435 (Surr. Ct. 1934) (trustee refused payment to niece for bad morals to reinter settlor, the brother, and father), *aff'd*, 244 App. Div. 791, 280 N.Y.S. 967 (1935); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

183. *In re Koretzky*, 8 N.J. 506, 86 A.2d 238 (1951) (animosity between trustee and beneficiary); *Buchar's Estate*, 225 Pa. 427, 74 A. 237 (1909) (hostility between brothers, one a trustee-beneficiary, the other a beneficiary); *Klug v. Klug*, [1918] 2 Ch. 67 (trustee refused advances to beneficiary who married without trustee consent); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

184. *Colton v. Colton*, 127 U.S. 300, 321 (1888) (trustee-beneficiary claimed there was no trust and denied benefits to mother and sister of settlor, the trustee's husband—hatred of in-laws); *McDonald v. McDonald*, 92 Ala. 537, 9 So. 195 (1890) (trustee beneficiary refused to use income to support his adult children—*pater familias*); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

185. *Sauvage v. Galloway*, 331 Ill. App. 309, 73 N.E.2d 133 (1947) (trustee tried to sell trust asset used in competing against his business); *Norcum v. D'Oench*, 17 Mo. 98 (1852) (trustee refused sale of land as it would be used as a graveyard adjacent to his land); *Matter of Ahrens*, 275 A.D.2d 588, 91 N.Y.S.2d 412 (App. Div. 1949) (trustees terminated trust, a shareholder, upon beneficiary signing liability release to avoid suing selves for corporate misdeeds thus cutting off contingent beneficiaries), *rev'd on the facts*, 301 N.Y. 701, 95 N.E.2d 53 (1950); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

with an improper motive, however, generally does not involve bad faith.¹⁸⁶ But again, under trust law, if a court finds that the trustee acted with an improper motive, it will substitute its own judgment for the decision the trustee should have made if that decision was incorrect.¹⁸⁷ A court will consider conflicts of interest when reviewing improper motives.¹⁸⁸

The last situation, where the trustee fails to act, should cause no concern under ERISA because ERISA provides a procedure to compel action on a claim and the associated plan interpretation.¹⁸⁹

Thus, the trust law that applies to judicial review of a plan administrator's discretionary decisions under ERISA provides for three situations: (1) when the plan administrator is properly motivated; (2) when the plan administrator's decision involves self-dealing; and (3) when the plan administrator's decision involves an improper motive other than self-dealing. The latter two instances generally constitute prohibited transactions (i.e., actions deemed imprudent *per se*¹⁹⁰ under ERISA)¹⁹¹ and make the plan administrator liable to the plan for any damage suffered by the plan.¹⁹² However, in the claim denial and plan interpretation situations, while the plan suffers no damage, the employee/beneficiary does. Thus, the employee/beneficiary must enforce violations of fiduciary duties in these two instances.¹⁹³ However, the question is not whether ERISA prohibited the decision, since ERISA permits employers and their representatives to be plan administrators without violating the prohibited transaction requirement,¹⁹⁴ but what standard of review governs a court reviewing the discretionary action in these situations.

186. *In re Koretzky*, 8 N.J. 506, 86 A.2d 238 (1951); see also 3 W. FRATCHER, *supra* note 134, § 187.5 (discussing improper motive). The ERISA cases do appear to equate "bad faith" with improper motive—usually animosity. See, e.g., *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1298 (5th Cir. 1985) (hostility).

187. *Colton*, 127 U.S. at 321.

188. RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

189. 29 U.S.C. § 1133 (1982); 29 C.F.R. § 2560.503-1 (1988).

190. See *McDougall v. Donovan*, 552 F. Supp. 1206, 1215-16 (N.D. Ill. 1982).

191. 29 U.S.C. § 1106(b) (1982).

192. *Id.* §§ 1109, 1132.

193. *Id.* § 1132(1)(B). See *Fine v. Semet*, 514 F. Supp. 34 (S.D. Fla. 1981) (denial of lump-sum payout by major participants acting as plan administrators alleged to be self-dealing in violation of prohibited transaction rule, plaintiffs lost under arbitrary and capricious rule), *aff'd*, 699 F.2d 1091 (11th Cir. 1983); *Flinchbaugh v. Chicago Pneumatic Tool Co.*, 531 F. Supp. 110 (W.D. Pa. 1982) (deduction of severance pay from benefit by corporate officers acting as plan administrators alleged to be conflict of interest in violation of prohibited transaction rule, plaintiffs lost under arbitrary and capricious rule).

194. See 29 U.S.C. §§ 1002(16)(A)(ii), 1108(c)(3); *Flinchbaugh*, 531 F. Supp. at 113.

2. *When to Use the Arbitrary and Capricious Rule*

Under trust law, the arbitrary and capricious rule clearly does not apply to the last two of the three situations. In the first situation, for an employee benefit plan, the arbitrary and capricious rule should apply to the disinterested plan administrator and not to the interested plan administrator, regardless of the propriety of his motive. The following reasons mandate this conclusion. In applying this trust law to ERISA plans, courts must follow the congressional directive to consider the special characteristics of employee plans.¹⁹⁵ These characteristics are manifested through three major differences between the typical trust and the employee benefit plan: (1) an employee benefit plan settlor generally will continue to make future contributions to the trust¹⁹⁶ and hence has a desire to reduce the amount of those future contributions; (2) the contribution does not represent a gift of the settlor's property to the beneficiary,¹⁹⁷ but represents the employee/beneficiary's deferred compensation and property;¹⁹⁸ and (3) the claim denial decision for review by the court is the second decision of a two-tiered process in which the plan administrator has reviewed its own initial denial and seeks to justify its prior determination in a nonneutral fashion.¹⁹⁹

The first difference pertains to the self-dealing situation to which the arbitrary and capricious rule does not apply. Although ERISA prohibits direct

195. See *supra* note 154 and accompanying text.

196. Most employee benefit plans are long-term programs. The Internal Revenue Service requires retirement plans to be permanent, as distinguished from temporary programs. 26 C.F.R. § 1.401-1(b)(2) (1989). However, some plans may be one-time affairs, such as a severance pay plan for a sold subsidiary.

197. Some employers create employee benefit plans pursuant to a contractual obligation between the employer and the beneficiary. See, e.g., *Melin v. N.W. Bell Tel. Co.*, 266 N.W.2d 183, 186 (Minn. 1978).

198. See Comment, *supra* note 10, at 1003-07 (deferred compensation theory).

The parties create welfare plans to provide the benefits with pretax dollars. The employer may deduct the payment and the employee receives no taxable benefit. I.R.C. §§ 106, 125, 419 (1988). In the alternative, the employer could pay the money to the employee and have the employee buy the benefit from an insurance company or other service provider. However, those benefits would be less because the employee receives no deduction from his taxes for the payment. *Id.* § 61.

The parties create retirement plans to provide for tax free build-up of moneys before the employee must pay tax on this portion of his income. The employer may also deduct the contribution and the benefit is not taxed until received by the employee years later. *Id.* §§ 402, 404. In the alternative, the employer could pay the employee immediately, let him pay tax on the amount, *id.* § 61, and invest the remainder, paying tax on the income. *Id.* § 61. The result would be a smaller "nest egg" at retirement.

199. See Thomas, *Due Process, Hearings, and Pension and Welfare Plan Claim Denials Under the Employee Retirement Income Security Act of 1974*, 28 LAB. L.J. 276, 285 (1977) (advocating a due process hearing at the plan administrator level [now permitted but not required, 29 C.F.R. § 2560.503-1(h) (1987)] or de novo review at the trial level).

and indirect transactions between plan administrators²⁰⁰ and the plan, and permits employers to serve as the plan administrators without violating these prohibitions,²⁰¹ effective self-dealing will also arise if the employer/plan administrator denies claims for welfare plans and defined benefit plans, thereby reducing the employer's future contributions. Any such denial, although perhaps not egregious, amounts to employer self-dealing, because the employer benefits from the plan.

Realization of the inherent employer self-dealing if the employer serves as the plan administrator, recognition that the funds belong to the employee/beneficiary²⁰² (residing in the employee benefit plan trust solely to escape federal tax), and recognition of the bias in plan administrators' final decisions, certainly demand the distinction between the interested and disinterested plan administrator for employee benefit plans to a greater extent than is normally recognized in trust law.

Hence, courts should divide the first category for review into two subcategories: the first portion for the interested plan administrator and the second portion for the disinterested plan administrator. The ERISA arbitrary and capricious rule, with its absence of de novo review and substantial evidence requirements, clearly applies only to this latter category: the case of the disinterested plan administrator with proper motives. In all other cases, specifically the case of the interested plan administrator with proper motives, the case of demonstrated or actual self-dealing, and the case of demonstrated improper motive other than self-dealing, the court should use de novo review.

3. *Application of the Proper Rule to Typical Plan Administrators*

The spectrum of potential plan administrators runs from the employer serving as the plan administrator²⁰³ to the equally balanced LMRA plan administrator.²⁰⁴ Congress did not intend, nor is it wise, to treat all types of plan administrators equally. Clearly the employer serving as a plan administrator functions as an interested plan administrator to which the de novo review rule should apply. The LMRA plan administrator, however, is disin-

200. 29 U.S.C. § 1106 (1982).

201. *Id.* §§ 1002(16)(A)(ii), 1108(c)(3).

202. ERISA requires the employer to relinquish ownership of the contributions. *Id.* § 1103(c)(1).

203. ERISA permits this practice. *Id.* §§ 1002(16)(A)(ii), 1108(c)(3).

204. These are the two extremes noted by the Third Circuit in breaking with the past. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987) ("The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees."), *aff'd in part and rev'd in part*, 109 S. Ct. 948 (1989).

terested,²⁰⁵ and, therefore, the arbitrary and capricious rule should apply.²⁰⁶ Between these two extremes, the common arrangements for a plan administrator involve a committee of high management officials,²⁰⁷ a committee of employees,²⁰⁸ and service providers.²⁰⁹ Because of actual conflicts of interest that high management employees have as plan administrators between their duty of loyalty to the corporation as managers and their duty of loyalty to the plan as fiduciaries, the court should conclusively presume them interested plan administrators²¹⁰ to which de novo review applies.

A court should also deem the committee of employees and the service provider interested upon a showing of that interest. For example, the plan may have formally or informally tied the plan administrator's yearly compensation to the frequency of benefit denials²¹¹ or the employer may have explicitly stated that the plan administrator would not keep the job if the plan paid out too many benefits.²¹² Thus, courts should review the plan administrator's decision on a de novo basis when the employer or a committee of management employees serve as the plan administrator or when the employee/beneficiary has discharged the burden of proof of showing that another type of plan administrator has engaged in self-dealing or acted with an improper motive.

205. Congress created the disinterested LMRA plan administrator with no thought of what review rule would apply, but rather to prevent union abuses in asset management. *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 571-72 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). Regardless of the reason for the arrangement, once made, trust law determines the review rule on the basis of that disinterested arrangement.

206. See *supra* note 51 and accompanying text.

207. See *supra* note 22.

208. See *id.*

209. Cf. *Schulist v. Blue Cross*, 553 F. Supp. 248, 252 (N.D. Ill.), *aff'd*, 717 F.2d 1127 (7th Cir. 1983) (service provider must have authority to review denied claims); *Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162 (C.D. Cal. 1980) (same); *Austin v. General Am. Life Ins. Co.*, 498 F. Supp. 844 (N.D. Ala. 1980) (same).

210. This conflict, as it applies to investment decisions by plan trustees, has caused one commentator to suggest repeal of the exception from prohibited transactions for certain acts of corporate officers contained in ERISA. 29 U.S.C. § 1108 (c)(3) (1982). Note, *Conflicts of Interest Arising Under ERISA's Fiduciary Standards: Can the Trustee Ever Be Prudent, As Long As He Faces Dual Loyalties?*, 9 NOVA L.J. 413 (1985).

211. See Amici Brief for Chamber of Commerce, *supra* note 178, at 29; cf. *NLRB v. Ohio New & Rebuilt Parts, Inc.*, 760 F.2d 1443, 1448 (6th Cir.) ("substantial personal, financial and other irrelevant and impermissible interests"), *cert. denied*, 474 U.S. 1020 (1985); *Tumey v. Ohio*, 273 U.S. 510 (1927) (criminal trial before a judge with direct personal interest in convicting defendant is a denial of due process rights).

212. See Amici Brief for Chamber of Commerce, *supra* note 178, at 29 n.35.

B. Prior Case Law Approach

Two other approaches lead to the conclusion that de novo review should apply, although the Supreme Court has disparaged them. In *Firestone Tire & Rubber Co. v. Bruch*,²¹³ the Supreme Court recognized an additional congressional intention in passing ERISA: the intent to incorporate much of the LMRA fiduciary law into ERISA.²¹⁴ Plan administrators contend this means the arbitrary and capricious rule.²¹⁵ However, the history of the adoption of the LMRA rule indicates that the courts adopted the trust rule contained in the Restatement of Trusts.²¹⁶

In determining the validity of the plan administrators' contention, clearly a precedent case has both a maximum holding and a minimum holding.²¹⁷ The minimum holding of the first LMRA circuit court opinion²¹⁸ would be the arbitrary and capricious rule with its deferential, narrow review.²¹⁹ An LMRA plan has disinterested plan administrators, and therefore the arbitrary and capricious rule generally would apply. The maximum holding would be the full review rule of the Restatement of Trusts.²²⁰ The LMRA cases, however, generally do not involve self-dealing (with an evenly balanced plan administrator): hence large portions of the full trust rule would not apply to the LMRA plans. Thus, the LMRA rule incorporated into

213. 109 S. Ct. 948 (1989).

214. The Supreme Court once suggested that ERISA codified the fiduciary standards of the LMRA. *NRLB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981) ("ERISA essentially codified the strict fiduciary standards that . . . [LMRA] trustee must meet."); see also *Firestone*, 109 S. Ct. at 953. However, the citations supplied by the Court (29 U.S.C. § 1002(1)-(2) (1982); H.R. CONF. REP. NO. 1280, *supra* note 6, at 296, 307, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 5076-77, 5088) do not support this proposition.

215. *Firestone*, 109 S. Ct. at 953.

216. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). See *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958) (noncharitable trust rule); *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958) (the charitable trust rule); *Barlow v. Roche*, 161 A.2d 58, 63 n.16 (D.C. 1960) (citing SCOTT ON TRUSTS § 187 (2d ed. 1956)). See also *supra* notes 132-52 and accompanying text.

217. K. LLEWELLYN, *BRAMBLE BUSH* 69 (1960).

218. *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962); see *supra* notes 148-52 and accompanying text.

219. The District of Columbia Circuit followed this approach because that circuit frequently cites the LMRA rule as "arbitrary or capricious." See, e.g., *Norton v. I.A.M. Nat'l Pension Fund*, 553 F.2d 1352, 1357 (D.C. Cir. 1977); *Pete v. United Mine Workers Welfare & Retirement Fund*, 517 F.2d 1275, 1283 (D.C. Cir. 1975); *Roark v. Boyle*, 439 F.2d 497, 499 (D.C. Cir. 1970); *Gaydosch v. Lewis*, 410 F.2d 262, 265 (D.C. Cir. 1969); *Roark v. Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968); *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

220. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). Several circuit courts followed this approach as a result of adding bad faith or other elements to the arbitrary and capricious rule. See, e.g., *Beam v. International Org. of Masters, Mates, & Pilots*, 511 F.2d 975, 980 (2d Cir. 1975); *Brune v. Morse*, 475 F.2d 858, 860 (8th Cir. 1973) (citing section 187); *Danti*, 312 F.2d at 348.

ERISA by Congress represents the full trust rule because Congress did not intend to adopt an attenuated arbitrary and capricious rule in light of the purposes of ERISA to benefit employee/beneficiaries.²²¹

Further, congressional debates made clear one of the implicit directives: that the courts were to develop the federal common law of employee benefit plans by considering their special characteristics,²²² and the various methods of selecting the plan administrator is one of those characteristics.²²³ The LMRA cases did not contain this factor. The Supreme Court, however, dis-favors this approach,²²⁴ mistakenly indicating (1) that the courts adopted the arbitrary and capricious rule for the LMRA cases to assert federal jurisdiction to review the decision because the LMRA did not provide for suits against plan administrators by employee beneficiaries for erroneous decisions²²⁵ and (2) that reason does not apply to ERISA, which specifically provides for such suits.²²⁶

C. Statutory Standard Approach

Another approach involves recognition of the proposition²²⁷ that the LMRA standard of behavior for the plan administrator differs significantly from the ERISA mandate, namely the prudent man standard with similar

221. See *supra* note 37.

222. See *supra* note 154.

223. The Conference Report states:

A named fiduciary may be a person whose name actually appears in the document, or may be a person who holds an office specified in the document, such as the company president. A named fiduciary also may be a person who is identified by the employer or union, under a procedure set out in the document. For example, the plan may provide that the employer's board of directors is to choose the person who manages or controls the plan. In addition, a named fiduciary may be a person identified by the employers and union acting jointly. For example, the members of a joint board of trustees of a Taft-Hartley plan would usually be named fiduciaries.

H.R. CONF. REP. NO. 1280, *supra* note 6, at 297, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 5078.

224. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 953-54 (1989).

225. Legal history does not support this position. The question of jurisdiction and the use of the arbitrary and capricious rule to supply jurisdiction did not arise until the late 1960s (at the circuit court level in 1962), after the adoption of the arbitrary and capricious rule for the review of plan administrator discretionary decisions in the LMRA plans, primarily because the plan administrators conceded jurisdiction. See Welch & Wilson, *Applicability of Traditional Principles of Trust Law to Union and Management Representatives Administering Taft-Hartley Trusts*, 23 LAB. L.J. 671, 675 (1972); Goetz, *Developing Federal Labor Laws of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 927 (1970), see also Comment, *supra* note 35, at 1037-39; Comment, *supra* note 10, at 992-93.

226. 29 U.S.C. §§ 1109(a), 1132 (1988).

227. See E. LEVI, *supra* note 88, at 2 ("[Rule change] depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.").

duties and in similar circumstances,²²⁸ which applies to all fiduciary actions, not just those involving investments.²²⁹ Court review of a plan administrator's action should involve the question of whether the plan administrator satisfied the statutory standard. The statutory standard requires identification of a fiduciary in similar circumstances to the plan administrator.

Section 187 of the Restatement (Second) of Trusts should apply to the discretionary decisions of the plan administrator under the prudent man rule.²³⁰ An employee benefit plan often corresponds to a trust,²³¹ especially in light of the congressional statements concerning the applicability of trust law to these plans.²³² The plan administrator clearly corresponds to the trustee of a trust. The Supreme Court, however, has mistakenly disparaged this approach by stating that ERISA does not provide an appropriate standard of judicial review.²³³ Moreover, future courts must distinguish or overrule the past failures of courts to recognize the prudent man rule in these cases of discretionary actions.

D. Rule for Plan Interpretation

The remaining question concerns the applicable rule for court review of a plan administrator's discretionary power to interpret the plan. As shown above, trust law generally applies to ERISA plans.²³⁴ Trust law provides

228. See *supra* note 9.

229. See, e.g., Comment, *Investment of Qualified Pension Fund Assets and Fiduciary Responsibilities Under ERISA*, 12 W. ST. U.L. REV. 267, 272 (1984); Comment, *supra* note 10, at 1001.

230. A few circuit courts have recognized that the prudent man standard applies to the plan administrator's discretionary decisions. See *Witmeier v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986) (trustees acted in a reasonable and prudent manner); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 334 (3d Cir. 1984) (providing that the decision affects a class and not just one individual); *Pierce v. NECA-IBEW Welfare Trust Fund*, 620 F.2d 589, 591 (6th Cir.) (trustee's actions upheld under arbitrary and capricious rule for the LMRA and prudent man rule for ERISA), *cert. denied*, 449 U.S. 1015 (1980).

231. Some welfare plans have no formal trust, relying entirely upon the general assets of the employer. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 951 (1989).

232. The House Report expressly highlighted the relationship:

The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts. The section was deemed necessary for several reasons. First, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable.

H.R. REP. NO. 533, *supra* note 30, at 11-12, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4649-50.

233. *Firestone*, 109 S. Ct. at 953 (citing two circuit court opinions expressing doubt as to the circumstances under which different standards apply). This may merely mean that another logical step is needed, such as the one proposed here.

234. See *supra* notes 162-94 and accompanying text.

that the court, not the trustee, interprets the trust's terms,²³⁵ even when the trustee possesses interpretive discretion.²³⁶ Usually, the rules of trust construction, as with deeds and wills, dictate that the courts construe the trusts in favor of the conveyancer/settlor's intent.²³⁷ This is appropriate when the trustee has no interpretive discretion. However, when the trustee does possess that discretion, trust law requires a court to review the decision under the "abuse of discretion" standard used for other discretionary actions.²³⁸ This means that a court will use *de novo* review for the interested employer plan administrator, tending to construe the plan's terms against the employer, as courts did under the pre-ERISA state decisions favorably commented upon by the Supreme Court.²³⁹ A court using the prudent man rule would reach a similar result. Welfare plans often resemble insurance contracts in which the court construes the terms against the draftsman.²⁴⁰ Hence, a prudent plan administrator should similarly interpret the welfare plan as if it were an insurance contract.²⁴¹

VI. IMPACT OF THE PROPER RULE

A. Structuring the Plan Administrator to Avoid the Problem

The impact on employee benefit plans of implementing the proper rule for court review of discretionary plan administrator decisions will depend on the plan administrator's structure. For union-negotiated plans, numerous unrelated employers typically serve as the settlors or source of plan contributions. Under the LMRA, these plans have balanced and thus disinterested plan administrators.²⁴²

235. 3 W. FRATCHER, *supra* note 134, § 201; *see also* RESTATEMENT (SECOND) OF TRUSTS § 201 comment b (1959) (trustee is in breach of his fiduciary duty when he interprets the trust as authorizing him to do acts that a court determines he is not authorized to do).

236. *Taylor v. McClave*, 128 N.J. Eq. 109, 15 A.2d 213 (1940).

237. RESTATEMENT (SECOND) OF TRUSTS § 4 (1959).

238. *See Taylor*, 128 N.J. Eq. at 112, 15 A.2d at 215 (using a reasonable test for a disinterested trustee); BOGERT, *supra* note 167, at 169-71.

239. *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 956 (1989) ("Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.").

240. RESTATEMENT (SECOND) OF CONTRACTS § 206 comment b (1982).

241. Unfortunately, plan administrators are not as ethical as one would hope and instead have urged that the ERISA construction rule not only differs from the standard in similar circumstances (the prudent man rule) but favors the plan administrator. *See Torimino v. United Food & Commercial Workers*, 548 F. Supp. 1012 (E.D. Mo. 1982), *aff'd*, 712 F.2d 882 (8th Cir. 1983); *see also* Mandel, *supra* note 36, at 457-66 (suggesting that insurance companies convert state insurance contracts cases into federal ERISA claims to avoid state construction rules and bad faith insurance claims lawsuits [a most unethical suggestion]).

242. 29 U.S.C. § 186(c)(5) (1982).

Non-union-negotiated plans typically have one employer or a related employer group as the settlor. These plans typically specify the employer, a committee of management employees, or occasionally a service provider as the plan administrator. The ability of non-union-negotiated plans to establish disinterested plan administrators may be difficult because many plans reserve to the employer the right to appoint plan administrators.²⁴³ Legislative history suggests that those who appoint fiduciaries are themselves fiduciaries.²⁴⁴ Thus, the employer, acting through its board²⁴⁵ in selecting a committee of management employees, a committee of rank and file employees, or a service provider will create a conflict of interest between the plan administrator (their continued employment) and the employee/beneficiaries. A court must take into account this conflict when determining whether the plan administrators acted with an improper motive by furthering the interest of the employer, also a fiduciary, in denying a claim.

Appointing a service provider as plan administrator may not completely reduce the possibility of de novo review. Some insurance companies assume the risk of a fully-insured welfare plan for a fee.²⁴⁶ The more claims payments are made from the pool of contributions, the smaller the insurance company's profits on servicing the plan. A claim denial would then amount to self-dealing, and in subsequent litigation a court would subject the risk-assuming service provider to the same review as the employer serving as plan administrator.

Non-union-negotiated plans fall into two different groups: those created by large companies in which management views the company as a welfare state and generally concerns itself with the employees' welfare; and those created by small companies in which an entrepreneurial management regards the plan's assets as belonging to it and not the rank and file employees, whom employers included in the plan only to meet coverage requirements.²⁴⁷ Only this latter group of employee benefit plans are likely to experience any problems avoiding de novo review.

243. See Grogan, *Fiduciary Responsibility Under ERISA*, 54 TAXES 961, 962, 967-68 (1976).

244. H.R. CONF. REP. NO. 1280, *supra* note 6, at 323 ("Under this definition, fiduciaries include officers and directors of a plan, members of a plan's investment committee and persons who select these individuals."), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5103.

245. See MODEL BUSINESS CORP. ACT ANN. 3d § 8.01 (Supp. 1989).

246. Brief for the American Council of Life Insurance and Health Insurance Association of America as Amicus Curiae at 9, *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989) (No. 87-1054) [hereinafter *Amicus Brief for Insurance Council*].

247. I.R.C. § 410 (1988).

B. No Increased Litigation

Plan administrators fear that de novo review of their discretionary decisions will increase litigation.²⁴⁸ De novo review also consumes judicial resources expended in reviewing routine plan administrator decisions that courts would not review under the arbitrary and capricious rule.²⁴⁹ This fear assumes that disappointed claimants will sue more frequently, because de novo review, which is not as deferential to the plan administrator as the arbitrary and capricious rule, would increase the chances of the employee/beneficiary winning. However, ERISA's object was not to reduce litigation but to provide remedies for employee/beneficiaries.²⁵⁰

Moreover, the increased cost of de novo review burdens the employee/beneficiary as well and may even deter litigation by disappointed employee/beneficiaries.²⁵¹ Even if the number of lawsuits did not increase, the time spent on each case could rise.²⁵² However, under the proper review rule for plan administrator discretionary decisions, the disappointed claimant could only use de novo review if either the plan administrator was the employer, a committee of management employees, or a risk-assuming service provider; or the claimant satisfied the burden of proof on the plan administrator's self-dealing or some other improper motive.²⁵³ Because the denying or granting of single claims involves amounts too small to require impartiality among a committee of employees or a non-risk-assuming service provider serving as plan administrator,²⁵⁴ self-dealing will not be very common (or apparent) except when a plan administrator denies many claims.²⁵⁵

The plan sponsor could greatly reduce the possibility of de novo review in these situations by providing that the plan administrator is someone other than the employer, a committee of management, or a risk-assuming service provider, such as a committee of nonmanagement employees, a committee

248. *Firestone*, 109 S. Ct. at 956.

249. Amicus Brief for ERISA Industry, *supra* note 178, at 12.

250. H.R. REP. NO. 533, *supra* note 30, at 12 ("[E]ven assuming that the law of trusts is applicable, without detailed information about the plan, access to the courts, and without standards by which a participant can measure the fiduciary's conduct he is not equipped to safeguard either his own rights or the plan assets."), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 4650.

251. *See* Thomas, *supra* note 199, at 286.

252. For this reason, courts adopted the absence of de novo review for LMRA cases. *Ruth v. Lewis*, 166 F. Supp. 346, 349 (D.D.C. 1958).

253. *See, e.g., Mesler v. Holly*, 318 So. 2d 530, 533 (Fla. Dist. Ct. App. 1975).

254. *See* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1051 (7th Cir. 1987).

255. The employee/beneficiary presented this type of case in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 951 (1989), where the employer denied severance pay to a whole class of employees, those of a sold subdivision.

selected by a process similar to that for LMRA plans, or some disinterested outsider, such as an insurance company or some other service provider. The plan administrators could reduce the likelihood of de novo review if they changed their approach from following management's desires and subsequently justifying their decision, to deciding in a fair manner initially. The paucity of ERISA cases dealing with a plan administrator's improper motive²⁵⁶ suggests that employee/beneficiaries will have difficulty proving improper motive. Hence, under the proper rule for reviewing a plan administrator's discretionary decision, litigation should not increase significantly due to the small likelihood of future situations involving improper motives due to plan administrator restructuring as well as the difficulty of proving improper motives.

C. No Increased Administrative Costs

Plan administrators also fear that de novo review will increase administrative costs due to litigation and will discourage employers from adopting employee benefit plans.²⁵⁷ The plan, and, except for defined contribution plans, the employer, through future contributions, generally will bear the expense of litigation against plan administrators who successfully defend the action.²⁵⁸ Additionally, employers may pay judgments rendered against plan administrators²⁵⁹ and often undertake to do so to encourage persons to serve in these capacities. Nonetheless, increased cost should not present serious problems because the disappointed claimant could only use de novo review if (1) the plan administrator was the employer, a committee of management employees, or a risk-assuming service provider, or (2) the claimant satisfied the burden of proof on the basis of the plan administrator's self-dealing or some other improper motive.

Moreover, trial courts may award attorney's fees and costs of the action,²⁶⁰ thus, disappointed claimants are not likely to bring suit without some legitimate ground for believing the plan administrator wrongfully took the action. If employees do litigate, the court will have a mechanism for discouraging frivolous lawsuits. Plan administrators, on their own initiative, could reduce this problem by making the correct, ethical decision rather

256. Cf. *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1298 (5th Cir. 1985) (trial court did not find improper motive on the basis of officer's testimony when alleged benefits denied due to hostility).

257. Amicus Brief for Insurance Council, *supra* note 246, at 10-11.

258. See 29 U.S.C. § 1108(c)(2) (1982) (permitting reimbursement of expenses properly and actually incurred).

259. See 29 C.F.R. § 2509.75-4 (1987). Such provisions require careful drafting to avoid ERISA prohibitions against similar provisions. 29 U.S.C. § 1110.

260. 29 U.S.C. § 1132(g) (1982).

than following the current practice of doing what the employer desires, finding a reasonable justification, and hiding behind the arbitrary and capricious rule. Employers presented similar arguments based on the administrative burden on employee benefit plans of amending plans for compliance and annual reporting when Congress first passed ERISA,²⁶¹ yet plans increased.²⁶²

D. Role of Potential Conflict

The possibility that the mere existence of a conflict of interest will trigger de novo review also concerns plan administrators.²⁶³ Plan administrators have basked in the absence of de novo review under the arbitrary and capricious rule for so long they have neglected to consider the significance of conflict of interest in court review of discretionary decisions. Under the proper rule and trust law, a court considers conflict of interest as only one factor among many to determine an improper motive other than self-dealing.²⁶⁴ Self-dealing clearly presents conflict of interest problems. However, the offense that triggers de novo review is not the conflict of interest's existence but self-dealing or improper motive, neither of which merits the absence of de novo review. Hence, a plan sponsor, wishing to avoid de novo review, should structure the plan administrator to remove the possibility of self-dealing.

The most obvious solution would be a neutral plan administrator similar to those found under the LMRA structure to which the arbitrary and capricious rule generally would apply. Such a structure would concern only those large employers who want to maintain veto power over multi-million dollar benefits caused by their own poor draftsmanship²⁶⁵ and those small employers who would like to maintain employer control of their employees' lives as much as possible. Those companies that desire to maintain such control must weigh that desire against the possibility of subjecting their plans' administrator to de novo review.

261. See, e.g., Comment, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 555, 627-28 (1975) (compliance with governmental requirements could result in lower pension benefit levels); Comment, *Attorney's Liability Under ERISA*, 82 W. VA. L. REV. 129, 153-54 (1979) (administrative costs have financially threatened some plans).

262. Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984) (from 340,000 plans in 1975 to 775,000 in 1983).

263. See, e.g., Amicus Brief for ERISA Industry, *supra* note 178, at 10.

264. RESTATEMENT (SECOND) OF TRUSTS § 187 comment g (1959).

265. This was the situation in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 951 (1989).

Whether the conflict of interest the court considers is actual conflict or potential conflict also concerns plan administrators.²⁶⁶ A fiduciary has a potential conflict of interest when he has a relationship with a nonbeneficiary that might cause a breach of duty to the beneficiary.²⁶⁷ A potential conflict matures into an actual conflict if the fiduciary actually permits the relationship to influence his decision or if he has inconsistent duties to a beneficiary and a nonbeneficiary.²⁶⁸

Self-dealing clearly constitutes actual conflict,²⁶⁹ as does having a committee of management employees serving as plan administrator. Hence the potential conflict problem will arise, not when the plan administrator is the employer (self-dealing) or a committee of management employees (actual conflict), but when the plan administrator has some relationship with the employer such as a committee of employees serving as plan administrator or a service provider serving as plan administrator by contract with the employer. However, because the conflict of interest is but a single factor for determining improper motive, it alone should not trigger *de novo* review, and hence whether the conflict amounts to potential or actual should not concern the employer.

What remains important, though, is whether conflict, actual or potential, such as spite, prejudice, or self-interest (other than self-dealing), caused the improper motive. Self-interest would be present if the plan administrator was a service provider who tied his income to the frequency of benefit denials, formally by contract or informally by understanding,²⁷⁰ or who knew prior plan administrators had been fired for paying out too much in benefits.

VII. CONCLUSION

The courts should review the discretionary decisions of plan administrators under the arbitrary and capricious standard only when dealing with disinterested plan administrators with proper motives. They should require *de novo* review in all other situations. Those other situations include: (1) an interested plan administrator, such as the employer, a committee of manage-

266. Amici Brief for Chamber of Commerce, *supra* note 178, at 16-17 ("Potential conflict of interest on ERISA plan does not alter standard of review.").

267. See, e.g., *American Cancer Soc'y v. Hamerstein*, 631 S.W.2d 858, 863 (Mo. 1981) (conflicts of interest between the trustee and beneficiary are considered in determining whether the trustees' actions were improperly motivated).

268. See, e.g., *Childs v. National Bank*, 658 F.2d 487, 490 (7th Cir. 1981) (trustees must act with the highest degree of loyalty toward beneficiaries).

269. *Goldman v. Rubin*, 292 Md. 693, 705-06, 441 A.2d 713, 720 (1982).

270. Cf. *Tumey v. Ohio*, 273 U.S. 510, 523 (1926); *NLRB v. Ohio New & Rebuilt Parts, Inc.*, 760 F.2d 1443, 1448-49 (6th Cir.), *cert. denied*, 474 U.S. 1020 (1985). See also *supra* note 211 and accompanying text.

ment employees, or a risk-assuming service provider; and (2) the employee/beneficiary satisfying his burden of proof that the plan administrator engaged in actual self-dealing or acted with an improper motive. This review standard will not cause difficulties so long as the plan sponsors, in structuring the plan, and the plan administrator, in making decisions regarding benefits, remember the words of Chief Justice Cardozo on fiduciary responsibilities: "Not honesty alone but the punctilio of an honor the most sensitive is . . . the standard of behavior."²⁷¹

271. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 544, 545 (1928).

